Hase & another v Abdullahi/Buko & 2 others (Environment and Land Appeal E019 of 2024) [2025] KEELC 5739 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5739 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E019 OF 2024

JO MBOYA, J

JULY 24, 2025

BETWEEN

DAHABU BONAYA HASE ..... 1ST APPELLANT

ALI ABDI GUYO ..... 2ND APPELLANT

AND

MOHAMMED ABDULLAHI/BUKO ..... 1ST RESPONDENT

HASSAN SHOTO TULU ..... 2ND RESPONDENT

COUNTY GOVERNMENT OF ISIOLO ..... 3RD RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate's court at Isiolo by Hon. M.A Odhiambo delivered on 27th September 2024 in ELC case No. 18 of 2017)

JUDGMENT

1. The Appellants [who were the Plaintiffs in the subordinate court] commenced the suit vide Plaint dated 20th September 2012 and wherein the Appellants sought the following reliefs:
    a. A Declaration that plot No. Isiolo Township/528T belongs to Imitiaz Mohamed Noor.
    b. An order of Permanent injunction restraining the 3rd Defendant from transferring plot no. Isiolo Township/528T to the 1st or 2nd defendants or any other person without the authority or consent of Imitaz Mohammed Noor or his duly constituted attorneys.
    c. Costs of the suit and interests at court rates.
2. The 1st Defendant [now the 1st Respondent] duly entered appearance and thereafter filed a statement of defence. Instructively, the 1st Defendant [1st Respondent] disputed the claims at the foot of the Plaint.

3. The 2nd Respondent also entered appearance and filed a statement of defence. In particular, the 2nd Respondent denied the claims by the Appellants. Moreover, the 2nd respondent contended that the ground which was being claimed by the Appellants herein constituted Plot no. 4 Jua-kali B which previously belonged to the 1st respondent [now deceased] but was sold and transferred to the 2nd respondent. Furthermore, the 2nd respondent contended that the appellants herein had previously attempted to sell unto him plot no. Isiolo Township/528T, but it later turned out that the said plot was non-existent.

4. The 3rd Respondent duly entered appearance and filed a statement of defence dated 19th October 2012 and wherein the 3rd respondent denied the claims by the appellants. Moreover, the 3rd respondent contended that Imitiaz Mohamed Noor [represented by the appellants herein] had a dispute over ownership of Plot no. 4 Isiolo and which dispute was entertained by the County Council Dispute Resolution Committee. In addition, it was contended that the dispute was resolved and a decision was rendered confirming that plot no. 4 Isiolo belonged to the 1st respondent herein.

5. Additionally, the 3rd respondent posited that the appellants herein did not tender and or produce any evidence to demonstrate the existence of plot number [No] 528T. To this end the 3rd respondent contended that the appellant's suit in the subordinate court did not disclose any reasonable cause of action or at all.

6. The suit before the subordinate court was heard and disposed of vide Judgment delivered on 27th September 2024, whereupon the learned trial magistrate found and held that the Appellants had neither proved nor established their claim in respect of plot no.528T – Isiolo. To this end, the learned trial magistrate proceeded to and dismissed the appellant's suit with costs to the respondents.

7. It is the said Judgment and consequential decree which has aggrieved the appellants' leading to the filing of the appeal beforehand. The appellants, vide the undated memorandum of appeal, have raised various grounds of appeal, namely;

    i. The Learned magistrate erred in law and fact by failing to appreciate the fact that neither the county surveyor nor the physical planner was able to definitely determine whether the disputed land was plot number 4 Jua Kali B or Plot number Isiolo Township 528T.

    ii. The Learned magistrate erred in law and fact in relying on the report of the county surveyor when neither the county surveyor nor the Physical Planner was able to definitely determine whether the disputed land was plot number 4 Jua Kali B or plot number Isiolo Township 528T when the deputy registrar visited the suit land.

    iii. The Learned magistrate erred in law and fact by failing to consider the findings of the status report of plot number Isiolo Township 528T and plot number 4 Jua Kali B presented by the plaintiffs in making her determination.

    iv. The Learned magistrate erred in law and fact by holding that the failure of the county surveyor and physical planner to provide physical corroboration to the plaintiff's claim of ownership of the suit property constituted definitive proof that the plaintiff had failed to establish ownership of plot number Isiolo township 528T by Imitiaz Mohammed Noor.

    v. The Learned magistrate erred in law and fact by failing to consider the scene visit report issued by the Deputy registrar, whose conclusion was that neither the physical planner nor the county surveyor was able to point out whether the disputed ground was plot 528T or Plot number 4 Jua Kali B.

vi. The Learned magistrate erred in law and fact in holding that he plaintiff's claim of fraud on the part of the defendants had been unsubstantiated in spite of a letter from the national land commission stating that the letter of allotment ref. No. 150748 that was adduced by the defendants did not emanate from the office of the commissioner of lands.

vii. The Learned magistrate erred in law and fact in failing to hold and find that the letter of allotment Ref. No. 150748 that was adduced by the defendants was not genuine for a number of reasons, including but not limited to the fact that it had no PDP to identify/pinpoint the ground it was referencing.

viii. The Learned magistrate erred in law and fact in failing to consider the letter and register of plots from the County Government of Isiolo confirming that plot 528T was registered in the name of Imitiaz Mohamed Noor and that adjacent plots were numbered in similar and chronological numbers.

ix. The Learned magistrate misdirected himself by ignoring the Plaintiff's evidence and submissions.

x. The entire finding[s] and Judgment of the learned magistrate is bad and is against the law and against the evidence on record.

8. The Appeal beforehand came up for directions on 3rd June 2025, whereupon the advocates for the parties confirmed that the record of appeal had been duly filed and served. Furthermore, the advocates for the parties covenanted to canvass and dispose of the appeal by way of written submissions. To this end, the court proceeded to and circumscribed the timeline[s] of the filing and exchange of the written submissions.

9. The appellants filed written submissions dated 10th June 2025 and wherein the appellant has raised and canvassed six [6] pertinent issues. Firstly, learned counsel for the appellants has submitted that the learned trial magistrate ignored and disregarded the status report that was filed by the Deputy Registrar who visited the scene pursuant to an order of the court. To this end, learned counsel for the appellants has referenced the report arising from the scene visit conducted on 6th July 2017. In addition, it has been submitted that had the learned trial magistrate considered the import and tenor of the report same [learned trial magistrate] would have come to the conclusion that the report by the County Surveyor and the Physical Planner contained numerous inaccuracies and or contradictions.

10. As pertains to the significance of carrying out a site visit, Learned counsel for the Appellants has cited and referenced the decision in the case of Masila vs Ndolo (2023) KEELC 21474, wherein the court is stated to have held that the purpose of visiting a scene [Locus in quo] is to enable the court to appreciate the totality of the evidence underpinning the dispute and to enable the court to render justice in respect of the matter in dispute.

11. Secondly, Learned counsel for the Appellant has submitted that though the appellant filed a status report pertaining to and concerning plot no. 528T Isiolo Township, the report filed by the appellant was neither referenced nor considered by the learned trial magistrate. Nevertheless, it was contended that the report under reference contained Sixteen [16] findings, including the finding that the suit land is located in a commercial zone in accordance with the town planning and not within the Jua kali as per the land use planning.

12. Moreover, it was submitted that the status report filed by the appellant would have been useful in guiding the learned trial magistrate in the determination of whether the suit plot lawfully existed or otherwise. However, it was contended that the exclusion and or failure to reference the status report

by the appellants has prejudiced the appellants' case. To this end, it was posited that the Decision of the Learned Trial Magistrate is contrary to the weight of evidence on record.

13. Thirdly, Learned counsel for the appellants has submitted that even though the learned trial magistrate referenced, considered and applied the report by the County Surveyor and the Physical Planner, the trial court however, failed to take into account the material contradictions apparent thereunder. Furthermore, it was submitted that the fact that the report by the County Surveyor and the Physical Planner did not corroborate the ground location of the suit property does not negate the existence of the suit property.

14. Fourthly, it was submitted that the appellants' tendered and produced before the trial court plausible, credible and cogent evidence to demonstrate fraud. In particular, learned counsel referenced the letter from the National Land Commission [NLC] which was produced before the court and which letter indicated that the letter of allotment relied upon by the respondents was neither authentic nor valid. To this end, Learned Counsel invited the court to take cognizance of the letter dated 17th December 2019.

15. Taking into account the contents of the letter under reference, learned counsel for the appellants has submitted that the appellants duly established and proved the plea of fraud to the requisite standard. In this regard, learned counsel for the appellant[s] has cited and referenced inter alia the decision in Orieny and another vs National Bank of Kenya (2024) KEHC; Vijay Morjaria vs Nansingh Mdhusing Darbar & another (2000) eKLR and Ndolo vs Ndolo (2008) 1 KAR, respectively.

16. With regard to the fifth [5th] issue, learned counsel for the appellants has submitted that the trial court failed to appreciate and take into account the various contradictions inflicting the respondents' letter of allotment. In particular, it has been submitted that the letter of allotment tendered and produced on behalf of the respondent did not reference the part development plan underpinning its issuance or at all. Besides, it was submitted that the letter of allotment under reference did not show/reference the ground position as pertains to plot no. 4, Isiolo, which is being claimed by the respondents.

17. Additionally, learned counsel for the appellants has also submitted that the learned trial magistrate failed to appreciate that the letter of allotment relied upon by the respondents showed the ground to be 0.05 ha, whereas the plot [disputed ground] measures 0.09 ha. In this regard, it was contended that the conclusion arrived at by the learned trial magistrate was not supported by the facts and the evidence.

18. Finally, learned counsel for the appellants has submitted that even though the appellants tendered and produced before the court a copy of the Register of Isiolo County showing/confirming the existence of the suit plot, the trial court failed to reference and or consider the said register. It was contended that had the learned trial magistrate appreciated and considered the register of plots from Isiolo county government, same [trial court] would have come to a different conclusion.

19. Premised on the foregoing, learned counsel for the appellants has submitted that the Judgment of the learned trial magistrate is replete with errors and thus same ought to be set aside. To this end, counsel has implored the court to find and hold that the appeal is merited.

20. The 2nd respondent filed written submissions dated 30th June 2025 and wherein same has raised and canvassed three [3] key issues, namely: whether the appellants have the requisite locus standi; whether the appellants proved ownership of plot NO. 528T Isiolo; and whether the appellants should be granted the reliefs sought at the foot of the Plaint or otherwise.

21. Regarding the first issue, learned counsel for the 2nd respondent has submitted that the appellants herein filed and prosecuted the suit in the lower court on the basis of a power of attorney on behalf of Imitiaz Mohamed Noor. However, it was contended that the power of attorney dated 24th July 2012;

was neither registered nor stamped in accordance with the provisions of sections 19 and 20 of the *Stamp Duty Act* Cap 480, Laws of Kenya. In this regard, it was therefore contended that in so far as the power of attorney was neither chargeable with stamp duty nor registered in accordance with section 4 of the *Registration of Documents Act*, same [power of attorney] was therefore illegal and invalid.

22. In view of the foregoing, it was submitted that the suit by and on behalf of the appellants, which was underpinned by an invalid power of attorney, was therefore incompetent and void for all intents and purposes. In this regard, learned counsel for the 2nd respondent has cited and referenced inter alia the holding in the case of Kenneth Simbiri vs Daniel Ongor (2020) eKLR and Francis Mwangi Mugo vs David Kamau Gachago (2017) eKLR, respectively.

23. With regard to the second issue, learned counsel for the 2nd respondent has submitted that the appellants herein failed to tender and or produce before the court plausible or credible evidence to demonstrate ownership to and or title over plot No. 528T Isiolo. In particular, it was submitted that the appellants failed to tender and or produce evidence that the term[s] of the letter of allotment being relied upon was duly complied with and or adhered to. Furthermore, it was submitted that the appellants also failed to produce the spatial plan to demonstrate the existence and ground location of the suit plot or at all.

24. Arising from the failure to tender and or produce the documents highlighted in the preceding paragraphs and failure to produce any certificate of lease, it was contended that the appellants did not prove ownership. Further and in any event, it was posited that a letter of allotment by and of itself cannot vest the appellant with title to and or in respect of the suit plot. To this end, learned counsel cited and referenced the decision of the Supreme Court [the apex Court] in Torino Enterprises Ltd vs the Attorney General (2023) KESC 79; and Bubaki Investment Co. Ltd vs National Land Commission and 2 others (2015) eKLR.

25. In respect of the last issue, learned counsel for the 2nd respondent has submitted that in so far as the appellants lacked the requisite locus standi and coupled with the failure to tender/produce any ownership documents to the suit property, it was contended that the appellants were therefore not entitled to the reliefs sought.

26. Flowing from the foregoing, Learned counsel for the 2nd respondent has submitted that the appeal beforehand is devoid bereft] of merit[s] and thus same ought to be dismissed.

27. The 3rd respondent filed written submissions and wherein same [3rd respondent] has reiterated the submissions by the 2nd respondent. In particular, the 3rd respondent has posited that the appellants herein on behalf of Imitiaz Mohamed Noor, had filed a dispute concerning ownership of plot NO. 4 Isiolo town. Moreover, it has been submitted that the dispute was entertained and adjudicated upon by the County Dispute Resolution Committee, which found and held that plot No. 4 Isiolo Township, belonged to the 1st respondent.

28. Furthermore, the 3rd respondent submitted that the appellants herein [who were the Plaintiffs] in the subordinate court did not demonstrate the existence of the suit plot or at all. To this end, it was contended that the Appellants' were therefore not entitled to the reliefs sought.

29. Finally, learned counsel for the 3rd respondent invited the court to find and hold that the appellants herein were devoid of the requisite locus standi to mount and or maintain the suit in the subordinate court. For coherence, it was submitted that the power of attorney which was being relied upon was illegal, invalid and void for all intents and purposes. To this end, counsel invited the attention of the court to the provisions of section 4 of the *Registration of Documents Act*.

30. Having reviewed the record of appeal, the evidence tendered [both oral and documentary] and having taken into account the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the subject appeal turns on Three [3] key issues, namely; whether the appellants' herein were seized of the requisite locus standi to commence, maintain and or prosecute the suit in the subordinate court or otherwise; whether the appellants established and demonstrated entitlement to plot no. 528T Isiolo Town or otherwise; and whether the learned trial magistrate committed any error in dismissing the appellant's suit or otherwise.

31. Being a first appeal, this court is vested with the jurisdiction to undertake exhaustive review, appraisal, re-evaluation and scrutiny of the entirety of the evidence tendered before the trial court and thereafter to form an independent conclusion arising out of the evidence on record. Nevertheless, it is imperative to observe that even though this court has the jurisdiction to depart from the factual conclusions and finding[s] of the trial court, such departure must only be undertaken when it is evident that the trial court either acted on a misapprehension of evidence on record; acted on no evidence; where the finding is perverse to the evidence on record, or where it is shown that there exist[s] a demonstrable error of principle, which vitiates [negates] the finding[s] of the trial court.

32. Suffice it to posit that the Jurisdictional remit of the first appellate court was recently re-visited 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) where the court stated thus;

> 37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts, among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows:
>
> "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law, an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question

> of fact, but it is a cogent 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."

33. Bearing in mind the principles espoused by the Court of Appeal in the decision [supra], I am now disposed to revert to the subject matter and to discern whether the impugned Judgment is well-grounded or otherwise. Notably, I shall address the issues hereinbefore mentioned sequentially, starting with whether the appellants were seized of the requisite locus standi to mount and prosecute the suit [sic] on behalf of Imitiaz Mohamed Noor or otherwise.

34. It is instructive to recall and reiterate that the appellants herein filed the suit in the subordinate court on the basis of[sic] a power of attorney dated 27th July 2012, which is said to have been donated by one Imitiaz Mohamed Noor [the donor]. Furthermore, the power of attorney under reference was tendered and produced before the court as Exhibit P1.

35. To the extent that the appellant's capacity to file and or prosecute the suit and by extension the subject appeal is premised on the said power of attorney, it is imperative to interrogate whether the power of attorney was valid in the eyes of the law and thus capable of underpinning the suit or otherwise.

36. To start with, it is evident that the power of attorney under reference is said to be a special power of attorney and not a general power of attorney. By virtue of being a special power of attorney, it then means that the donor of the power of attorney has granted [donated] to and in favour of the donee a special and limited mandate/authority to act on behalf of the donor. For good measure, the Donee of the power of attorney can only act in accordance with the power of attorney [intra vires] and not otherwise.

37. Additionally, it is not lost on me that where the Donee [Recipient] of a power of attorney acts outside the power of attorney [ultra vires] then the action in question is illegitimate and negates the transaction and or pleading, [if any].

38. Back to the power of attorney. The donor of the power of attorney only bequeathed to the appellants herein the power to sell and dispose of plot no. 528T Isiolo Township and to sign all the transactional documents on his behalf. Furthermore, the donor donated power to the appellants to pursue and recover all sums of money [if any] that would be due from the sale of the suit property.

39. However, the donor of the power of attorney did not vest into the appellants herein any power to sue and or commence any civil proceedings on his [donor's] name. Suffice it to state that if the donor had intended to confer the power on the appellants to file a suit and or such other proceedings, then the power of attorney [which is special in nature] would have stated as much.

40. In the absence of any express authority and or mandate, given to the appellants vide the special power of attorney, it then means that the suit that was filed in the subordinate court and by extension the appeal beforehand, were filed without the requisite authority of the Donor. Simply put, the appellants were divested of locus standi. Without the requisite Locus Standi, the Appellants' herein lacked the capacity to file the suit. [See the decision of the Court of Appeal in the case of Rajesh Prajivan Chudasama versus Sailesh Prajivan Chudasama [2014] eklr; Njau versus Nairobi City Counci[1983] eklr].

41. Other than the fact that the special power of attorney did not confer express authority to the appellants to file any suit on behalf of Imitiaz Mohamed Noor, it is also important to underscore that even where the power of attorney grants such authority [which is not the case], the donee of the power of attorney can only sue in the name and on behalf of the donor. For good measure, the donee cannot appropriate and or hijack the authority of the donor and purport to file the suit in his [donee's] name as has happened in respect of the instant matter. In this regard, there is no gainsaying that the appellants herein had no capacity to constitute themselves as the Plaintiffs and, by extension, the appellants. Yet again, the proceedings beforehand are fatally defective.

42. Thirdly, it is imperative to observe and highlight that a power of attorney is one such document that attracts stamp duty in line with the provisions of Sections 19 and 20 of the *Stamp Duty Act*, Chapter 480 laws of Kenya. To this end, there is no gainsaying that the impugned power of attorney ought to have been subjected to stamping and the requisite stamp duty fees paid.

43. It is instructive to underscore that where a document that requires to be stamped has not been stamped and the stamp duty has not been paid, such a document is inadmissible in law. Moreover, where the document is admitted before a court of law, then same does not command any probative value or at all.

44. To be able to appreciate the import and tenor of sections 19 and 20 of the *Stamp Duty Act*, it is imperative that same be reproduced.

45. The said sections stipulate thus;

> 19. Non-admissibility of unstamped instruments in evidence; and penalty
>
> (1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—
>
> (a) in criminal proceedings; and
>
> (b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.
>
> (2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.

(3) Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions—

(a) if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;

(b) in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under section 20 or of obtaining a certificate under section 21:

(c) in all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection (5), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.

(4) If any person is empowered or required by any written law to act upon, file, enrol or register a duplicate or copy of any instrument, and if the original of that instrument would require to be duly stamped if acted upon, filed, enrolled or registered by that person, that person may call for the production of the original instrument or for evidence to his satisfaction that it was duly stamped, and no person shall act upon, file, enrol or register any such duplicate or copy without production of the original instrument duly stamped or of evidence thereof.

(5) The penalty on stamping any instrument out of time referred to in paragraph (c) of subsection (3) shall be ten shillings in respect of every twenty shillings and of any fractional part of twenty shillings of the duty chargeable thereon and in respect of every period of three months or any part of such a period after the expiration of the time within or before which the instrument should have been stamped.

20. Stamping out of time

(1) Where an instrument is chargeable with stamp duty under this Act and should have been stamped before a certain event or before the expiration of a certain period, but has not been so stamped, a collector may give leave for the stamping of the instrument if he is satisfied—

(a) that the omission or neglect to stamp duly did not arise from any intention to evade payment of stamp duty or otherwise to defraud; and

(b) that the circumstances of the case are such as to justify leave being given. (2)If the collector grants leave under subsection (1) for the stamping of an instrument, the instrument shall be stamped on payment of the unpaid duty

including any additional stamp duty and of a penalty of one shilling in respect of every twenty shillings and of any fractional part of twenty shillings of the duty chargeable thereon and in respect of every period of three months or any part of such period after the expiration of the time within or before which the instrument should have been stamped:

Provided that—

(a) the penalty chargeable under this subsection shall not exceed one hundred per centum of the principal duty outstanding; and

(b) the collector may remit the penalty under this section up to a maximum of one million five hundred shillings, but shall not remit any penalty exceeding that amount without prior approval from the Cabinet Secretary.

(3) If any person applying for leave under this section is dissatisfied with the decision of the collector upon that application, that person may require his application to be referred to the Cabinet Secretary, whose decision thereon shall be final for all purposes.(4)Upon any application for leave under this section, the collector, or the Cabinet Secretary, may require sworn or other evidence in support of the application.

(5) When an instrument has been stamped by leave under this section it shall be deemed to have been duly stamped.(6)Notwithstanding the provisions of this section, no bill of exchange or promissory note shall, except as provided in sections 21, 22, 34 and 36, be stamped after execution.(7)In this section, "collector" does not include the Senior Collector of Stamp Duties.

46. I beg to state that in so far as the impugned power of attorney was not subjected to stamping, same was inadmissible before the court. In any event, the fact that the document was admitted by the court does not ipso facto denote that same was duly proved. Moreover, the mere admission of the power of attorney [which was inadmissible in the first place] does not confer same with any probative value. For good measure, mere production of a document is distinct from proof of a document; and probative value [if any] attachable to the document.

47. The Court of Appeal highlighted the distinction between production, proof and probative value [if any] attachable to a document produced in the case of Kenneth Nyaga Mwige vs Austin Kiguta (2015) eKLR.

48. For coherence, the court stated as hereunder;

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the

document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

49. Turning on to registration of the power of attorney, it is imperative to state and highlight that a power of attorney is a registrable instrument. [See Section 4 of the *Registration of Documents Act*]. To the extent that the power of attorney is a registrable instrument, it is therefore incumbent upon the donor of the power of attorney or the donee thereof to lodge the power of attorney for registration.

50. Nevertheless, it is apparent from the face of the power of attorney that same was neither lodged nor presented for registration. Moreover, there is no gainsaying that the power of attorney was never registered. For good measure, the registration of the power of attorney would have culminated into the power of attorney being assigned a registration number in accordance with the law.

51. The importance of the registration of a power of attorney, [which is a registrable document], was the subject of the decision[s] in the case of Kenneth Omolo Sibiri and another vs Daniel Ongor (2020) eKLR and Francis Mwangi Mugo vs David Kamau Gachago (2017) eKLR. Simply put, the power of attorney that was relied upon by the appellants was invalid.

52. Turning to the second issue, whether the appellants placed before the trial court plausible and credible evidence to demonstrate ownership to and or title of the suit property, it is important to reiterate that it is the appellants who approached the court contending that Imitiaz Mohamed Noor is the registered and beneficial owner of plot number 528T Isiolo Town. To this end, it was therefore incumbent upon

the appellants to tender and place before the court evidence to demonstrate that Imitiaz Mohamed Noor was indeed the allottee, registered owner, and beneficial owner of the plot.

53. Simply put, the burden of proving that Imitiaz Mohamed Noor was the owner of the suit property lay on the door steps of the appellants and not otherwise [See sections 107, 108 and 109 of the *evidence act* cap 80 laws of Kenya], [See also Agnes Nyambura Munga vs Lita Violet Shepad (2018) eKLR, Daniel Toroitich Arap Moi vs Mwangi Stephen Mureithi (2014) eKLR, Evans Odero Nyakwana vs Cleopas Ongaro Bwana (2015) eKLR, Raila Odinga and others vs IEBC & others (2017) KESC and Dr. Samson Gwer & 5 others vs KEMRI (2020) eKLR, respectively.

54. Did the appellants tender and produce any credible evidence to demonstrate ownership of and or title to the suit property? In their endeavor to demonstrate ownership of the suit plot, the appellants tendered and produced a letter of allotment dated 21st February 1999 issued to Imitiaz Mohamed Noor. The letter of allotment related to Un surveyed Commercial plot – Isiolo. However, there is no gainsaying that the letter of allotment does not highlight and or capture Plot no. 528T Isiolo; on the face thereof, or at all.

55. To the extent that the letter of allotment does not capture and or reference plot no. 528T Isiolo, it was incumbent upon the appellants to demonstrate and prove how the letter of allotment being relied upon mutated into and became the basis for claiming plot no. 528T- Isiolo. Sadly, no evidence was tendered to show and or demonstrate the correlation between the impugned letter of allotment and Plot No. 528T Isiolo [the Suit Property].

56. Secondly, it was also incumbent upon the appellant to tender and produce before the trial court evidence of acceptance of the terms of the letter of allotment, the payment of the stand premium [if any] and the consequential preparation of the cadastral plan/cadastral map and such other documents that would legitimize the impugned letter of allotment. Sadly, the appellants did not tender any such document.

57. Additionally, it is also important to state that the appellants herein were also called upon to tender and produce the minutes, [if any] of the County Council of Isiolo [now defunct] speaking to a recommendation for allotment of the suit plot. However, no such minutes were tendered and or produced.

58. I am aware that the appellants herein tendered and produced before the trial court a document alleged to be a copy of the plot register from the County Government of Isiolo, capturing/reflecting the existence of plot no. 528T bearing the name of Imitiaz Mohamed Noor. However, the segment referencing Imitiaz Mohamed Noor does not speak to the minutes [if any] allotting to the said plot. Furthermore, the said document is also not certified in the manner prescribed by the provisions of section 80 of the *Evidence Act*, Chapter 80, Laws of Kenya.

59. Other than the foregoing, it is not lost on me that the appellants case was predicated on a status report that was tendered and produced by PW 1. However, it is worth recalling that PW 1 who described herself as a valuation surveyor, thereafter admitted that she is not qualified either as a valuer, surveyor or physical planner. [See the cross-examination of PW 1 by counsel for the 2nd respondent].

60. Even though learned counsel for the appellants has submitted that the learned trial magistrate failed to reference and take into account the contents of the status report filed on behalf of the appellant, there is no gainsaying that the status report under reference was prepared and produced before the court by an unqualified person. Simply put, PW 1 was [sic] a quack and her report and evidence command no weight, probative value or substance. Same was duly disregarded.

61. To my mind, the appellants are the one who came to court screaming about ownership of the suit property. However, the appellants failed to tender and produce plausible; credible and believable evidence to vindicate their claim.

62. Finally, it is worth recalling that the trial court commanded the County Physical Planner and the County Surveyor to interrogate the legality of plot no. 528T Isiolo town versus Plot No. 4 Isiolo town and to prepare a report arising therefrom. To this end, a report dated 26th September 2018 was tendered and filed before the court on 2nd October 2018. The contents of the report under reference have been reproduced at the foot of paragraph 11 of the Judgment of the learned trial magistrate. In this regard, it would be superfluous to reproduce the findings arising from the investigations, save to state that the report under reference authenticated that plot no. 528T was not traceable on the ground. On the contrary, it is established that the disputed plot was plot no. 4 belonging to the 2nd respondent.

63. Suffice to state that the learned trial magistrate correctly considered and adopted the said report together with the rest of the evidence in coming to the conclusion that the appellants did not prove their claim. Instructively, the conclusions by the learned trial magistrate are grounded and anchored on the evidence on record.

64. In the premises, I am afraid that the appellants have neither established nor demonstrated any improper exercise of discretion or any error of principle to warrant interference with the findings and conclusions of the trial court. [See Mwanasokoni vs Kenya Bus Services Ltd (1985) eKLR and Jabane vs Olenja (1986) eKLR, respectively].

Final Disposition

65. Flowing from the discussion captured in the body of the Judgment, there is no gainsaying that the appeal beforehand is not only premature and misconceived, but same is also devoid of merit[s]. To this end, the appeal lends itself to dismissal.

66. Consequently, and in the premises, the final orders of the court are as hereunder;

    I. The Appeal be and is hereby dismissed.

    II. The Judgment and consequential decree of the subordinate court dated 27th September 2024 be and is hereby affirmed.

    III Costs of the Appeal be and are hereby awarded to the 2nd & 3rd Respondents only.

    IV. The Costs in terms of clause (III) shall be agreed upon and in default to be taxed by the Deputy Registrar.

67. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 24TH DAY OF JULY 2025.

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

JUDGE

In the presence of:

Mutuma – Court Assistant

Ms. Nyokabi for the Appellants

Mr. Kiogora Ng'ang'a for the 2nd Respondent

Mr. George Mwongela for the 3rd Respondent