Laibuni & another v Mwenda (Environment and Land Appeal 14 of 2023) [2025] KEELC 759 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELC 759 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL 14 OF 2023

JO MBOYA, J

FEBRUARY 13, 2025

BETWEEN

JOSEPH LAIBUNI ..... 1ST APPELLANT

JESSE MUTIGA LAIBUNI ..... 2ND APPELLANT

AND

HARUN MWENDA ..... RESPONDENT

JUDGMENT

Introduction and Background

1. The Respondent herein, [who was the Plaintiff in the subordinate court] filed the original suit, namely, Isiolo CMC E&L Case No. 29 of 2020 [hereinafter referred to as the original suit] and wherein the Respondent sought for various reliefs, including declaration of ownership in respect of Plot Number K/JUU/863, situate within Isiolo Town.

2. Furthermore, the Respondent also sought for an order of permanent injunction to restrain the current Appellants [who were the Defendants] in the original suit from interfering with the Respondent's right to and in respect of the suit property. Further and in addition, the Respondent also sought for general damages for trespass.

3. The original suit [details in terms of the preceding paragraph] was heard and determined vide Judgment rendered on the 28th November 2023 whereupon the learned trial magistrate found and held that the Respondent was the bona fide owner of the suit property. In this regard, the learned trial magistrate proceeded to and decreed a declaratory order as well as granted a permanent injunction.

4. Aggrieved by the judgment and decree of the learned trail magistrate, the Appellants herein filed the Memorandum of appeal dated the 18th December 2023; and wherein the Appellants raised a plethora of grounds.

5. For coherence, the Memorandum of appeal under reference has canvassed the following grounds of appeal

   i. The Learned Senior Resident Magistrate erred in law and fact in issuing an order for a permanent injunction against the Appellants on a plot in which they were in actual possession, occupation and use since the year 2014.

   ii. The Learned Senior Resident Magistrate misdirected himself in to considering extraneous issue and in arriving at a decision and judgment that was biased and against the weight of evidence before the court.

   iii. The Learned Senior Resident Magistrate misdirected himself into arriving at a decision and judgment that was obviously erroneous.

   iv. The Learned Senior Resident Magistrate erred in law and fact in dismissing and/or failing to consider the evidence of ownership of the plot as given by the Appellants.

   v. The Learned Senior Resident Magistrate erred in law and fact in considering the county surveyors report yet the surveyor had filed two contradicting report both dated and filed on the 27th October 2022, one which was favouring the Defendant and one which favouring the Plaintiff and therefore occasioning grave injustice to the Appellants.

   vi. The Learned Senior Resident Magistrate erred in law and fact by considering the county surveyors report favouring the Respondent yet the said district surveyor did not adjudicate the dispute impartially and was influenced by extraneous matters and hence the erroneous decision.

   vii. The Learned Senior Resident Magistrate erred in law and fact in disregarding the physical planners report which was tallying with one of the reports filed by the county surveyor.

   viii. The Learned Senior Resident Magistrate erred in law and fact in considering the county surveyors report which was referring to the Defendants documents.

   ix. The Learned Senior Resident Magistrate erred in law and fact in considering the county surveyors report vis a vis the physical planners report instead of ordering for a fresh scene visit or summoning the two experts in court to explain the contradiction in their reports occasioning injustice to the Appellants.

6. The instant appeal came up for directions on the 11th March 2024 in accordance with the provisions of Order 42 Rule 13 of the Civil Procedure Rules, 2010. Suffice it to state that directions were given to the effect that the appeal be canvassed by way of written submissions to be filed and exchanged by the parties. Furthermore, the court proceeded to and circumscribed the timelines for the filing and exchange of written submissions.

7. The Appellants filed written submissions dated the 2nd April 2024 whereas the Respondent filed written submissions dated the 11th April 2024. Instructively, when this court took over the conduct of matters at Isiolo on the 28th January 2025, both parties confirmed that same had filed and exchanged the written submissions.

8. For good measure, the court confirmed that the written submissions had indeed been filed. In any event, the written submissions had been lying in the court file since the 11th April 2024.

Parties' Submissions

a. Appellants' Submissions

9. The Appellants filed written submissions dated the 2nd April 2024 and wherein the Appellants adopted and reiterated the grounds contained at the foot of the Memorandum of appeal dated the 18th December 2023. Furthermore, the Appellant thereafter canvassed and highlighted three [3] salient issues for consideration by the court.

10. Firstly, learned counsel for the Appellants consolidated grounds 1, 2, 3 and 4 of the Memorandum of appeal and thereafter submitted that the Appellants herein bought/purchased plots number 1026B and 1027A, respectively from one Ezekia M Kaibi in the year 2014. Furthermore, learned counsel for the Appellants submitted that following the purchase/acquisition of the named plots, the Appellants entered upon and took possession of the properties in question.

11. It was the further submissions by learned counsel for the Appellants that subsequently the Appellants procured and was issued with a letter of allotment in respect of the suit properties. To this end, learned counsel for the Appellants referenced the letter of allotment dated the 12th August 1999.[See page 55 of the Record of Appeal.]

12. Additionally, learned counsel for the Appellant also submitted that other than the Letter of allotment which was issued to and in favour of the Appellants, the Appellants were also issued with the requisite Part Development Plan [PDP]; Beacon certificate and same [Appellants] have also been paying the ground rents in respect of the suit property.

13. Despite the documentation filed by and on behalf of the Appellants, learned counsel for the Appellant has submitted that the learned trial magistrate disregarded the said documents and thereafter proceeded to and decreed that the Respondent is the lawful owner and proprietor of Plot number K/JUU/863, which plot is contended to be non-existent on the ground.

14. Moreover, learned counsel for the Appellants has also submitted that insofar as Plot Numbers 1026B and 1027A had been duly allocated to the Appellants, the same plots/grounds ceased to be available for allocation to any other party, unless the Letter of allotment was revoked and/or cancelled.

15. In support of the foregoing submissions, learned counsel for the Appellants has cited and referenced the decision in Republic v City Council of Nairobi [2014]eKLR, wherein the court highlighted the legal position that a Letter of allotment once issued and complied with vests in the allottee ownership rights over the designated plots.

16. The second issue that was canvassed by and on behalf of the Appellants turns on grounds 5 and 6 of the Memorandum of appeal. In this regard, learned counsel for the Appellants has submitted that the learned trial magistrate erred in fact and in law in relying on the report filed by the County Surveyor dated the 27th October 2022, without appreciating that the County Surveyor had filed two [2] contradicting reports of even date.

17. In particular, learned counsel for the Appellants submitted that one report dated the 27th October 2022; by the County Surveyor postulates that the suit ground relates to Plot No. K/JUU/863; belonging to the Respondent whereas the contrary report of even date states that the disputed ground relates to plots numbers 1026B and 1027A. In this regard, learned counsel contended that it was not just, expedient and in the interest of justice for the learned trial magistrate to adopt one set of the report whilst ignoring the other.

18. Additionally, learned counsel for the Appellants has also submitted that the learned trial magistrate also committed an error in law in ignoring and disregarding the report which was filed by the Physical Planner and which report equally formed part of the record of the court, albeit without assigning any reason or at all.

19. Arising from the foregoing, learned counsel for the Appellants has submitted that the Judgment of the learned trial magistrate is therefore wrought with and replete of error[s] of law and thus same is manifestly unsafe.

20. The third issue that was canvassed touches on and or gravitates upon grounds 7 and 9 of the Memorandum of appeal. In this regard, learned counsel for the Appellants has submitted that the learned trail magistrate failed to properly appraise and interrogate the documentation relied upon by the Respondent and therefore same [trial magistrate] arrived at an erroneous conclusion that the Respondent was the lawful owner of the disputed plots.

21. Arising from the foregoing, learned counsel for the Appellants has therefore implored the court to find and hold that the impugned Judgment and the consequential decree, are contrary to the weight of evidence on record and thus same [Judgment] ought to be set aside.

22. Furthermore, learned counsel for the Appellants has invited the court to declare the proceedings that were undertaken before the trial court as unsatisfactory and a mistrial and thereafter to direct that the matter be heard de novo.

23. In a nutshell, learned counsel for the Appellants has posited that the appeal beforehand is meritorious and thus same [Appeal] ought to be allowed.

b. Respondent's Submissions:

24. The Respondent filed written submissions dated the 11th April 2024 and wherein same [Respondent] has highlighted and canvassed four [4] salient issues for consideration and determination by the court. For good measure, the Respondent has also grouped/clustered the various grounds of appeal.

25. First and foremost, learned counsel for the Respondent has submitted that the contention by the Appellants that the learned trial magistrate erred in law and in fact in granting an order of permanent injunction, yet it is the Appellants in occupation is erroneous and legally untenable. In any event, it has been submitted that once the court found and held that the Respondent was the owner of the suit property, then the court was at liberty to decree and grant an order of permanent injunction.

26. The second issue gravitates around grounds 2 and 3. In this regard, learned counsel for the Respondent has submitted that the Appellants' complaints underpinned by grounds 2 and 3 are devoid of particularity and specificity. In any event, it has been submitted that the grounds under reference are vague and thus incomprehensible.

27. Moreover, learned counsel for the Respondent has submitted that even though the Respondent has adverted to and contended that the learned trial magistrate was biased and took into account extraneous issues, no evidence of bias and/or extraneous issues has been highlighted and/ or availed. In this regard, learned counsel for the Respondent has submitted that grounds 2 and 3 [sic] amounts to nothing more than fluffs.

28. The third issue is premised on ground 4 of the Memorandum of appeal. In this regard, learned counsel for the Respondent has submitted that the Appellants herein failed to attend court on the 2nd May 2023 when the matter was scheduled for hearing and thus necessitating the matter to proceed Ex-parte and without the Appellants participation and involvement.

29. Additionally, learned counsel for the Respondent has submitted that even though the Appellants subsequently filed an application to set aside the Ex-parte proceedings and consequential orders closing the Defence case, which allocation was allowed, yet again, it has been contended that the Appellants failed to attend court. To this end, it has been posited that the Appellants case was ultimately closed without any evidence being tendered by and or on behalf of the Appellants.

30. Arising from the foregoing, it has been submitted that the Appellants herein did not tender and/or produce any evidence before the trial court. Furthermore, it has been posited that in the absence of any evidence by the Appellants, it is apparent and evident that the Respondent's case [read evidence] was uncontroverted.

31. The fourth issue that has been highlighted revolves around grounds 5, 6, 7, 8 and 9 of the Memorandum of appeal. It has been submitted that even though there were two [2] sets of reports filed by the County Surveyor, the learned trial magistrate was at liberty to adopt and rely on the report which was alluded to in the body of the Judgment.

32. On the other hand, it has also been submitted that even though the court order directing visitation of the scene [locus in quo] was directed to both the County Surveyor and Physical Planner; Isiolo County; it is only the County Surveyor who visited the locus in quo. On the contrary, it was contended that the County Physical Planner did not visit the locus in quo.

33. Moreover, it was submitted that the report which was filed by the County Physical Planner must have been prepared in his office, albeit under the influence and inducement by the Appellants. According to learned counsel for the Respondent, the report by the County Physical Planner is therefore devoid of probative value and therefore same was rightly disregarded by the learned trial magistrate.

34. Based on the foregoing submissions, Learned counsel for the Respondent has submitted that the Appeal beforehand is devoid of merits and thus same [appeal] ought to be dismissed.

35. Consequently, and in this regard, the court has been invited to proceed and dismiss the appeal with costs.

Issues for Determination:

36. Having reviewed the pleadings that were filed by and on behalf of the respective parties; the evidence tendered [both oral and documentary] the proceedings of the trial court; the Judgment rendered by the trial court and ultimately, the written submissions filed on behalf of the respective parties, the following issues do crystalize and are thus worthy of determination;

    i. Whether the Respondent duly proved and established his case as pertains to [sic] ownership of plot number K/JUU/863 [suit property] or otherwise.

    ii. Whether the Appellants herein bore any burden of proof, in the matter or otherwise.

Jurisdictional Posture:

37. The Appeal beforehand is a first appeal from the decision of the court of first instance. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyse the findings of the court of first instance and thereafter to arrive at an independent-conclusions, taking into account the pleading[s] filed; evidence on record and the applicable laws.

38. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse the findings and observations of the trial court, this court is however

called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless, the findings of the trial court are informed by extraneous factors or better still, are perverse to the evidence on record.

39. The scope and jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, the Court of Appeal for Eastern Africa elaborated on the applicable principle and stated thus;

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of 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..."

40. Likewise, the extent and scope of the Jurisdiction of the first appellate court was also elaborated upon in the case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the Court of Appeal held thus;

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.
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> > "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"
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> > 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"

41. Without endeavouring to exhaust the case law that elaborate[s] on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the Court of Appeal in

the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, where the court held as hereunder;

> As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters –vs- Sunday Post Ltd [1958] EA 424. In its own words: -
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> > "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ..."

42. Duly guided by the established position [ratio] which underlines the scope and extent of the jurisdiction of the 1st appellate court, I am now disposed to revert to the subject matter and to discern whether the learned trial magistrate correctly appraised, analyzed and evaluated the evidence tendered by the parties and in particular, the Respondent [who was the Plaintiff before the trial court] and thereafter correctly applied the law in the course of determining the dispute between the parties.

43. Additionally, I am also well positioned to review and re-evaluate the factual matrix [evidence] presented before the trial court and thereafter endeavor to ascertain whether the factual findings arrived at by the trial magistrate accord with the evidence on record or better still, whether the conclusions arrived at, were perverse to the evidence on record.

Analysis and Determination

Issue Number 1 Whether the Respondent duly proved and established his case as pertains to [sic] ownership of plot number K/JUU/863 [suit property] or otherwise.

44. It is the Respondent herein who approached the subordinate court contending that same [Respondent] is the bona fide owner and proprietor of Plot number K/JUU/863 [suit property]. Furthermore, it is the same Respondent who had contended that the Appellant herein who had interfered with his ownership rights over and in respect of the suit property.

45. Having contended that same is the bona fide owner of the suit property, it was incumbent upon the Respondent to tender and place before the trial court plausible, cogent, and credible evidence to underpin his [Respondent's] contention to be the bona fide owner of the suit property.

46. Suffice it to underscore that the burden and/or obligation rested with the Respondent. Furthermore, there is no gainsaying that the Respondent was called upon to place before the trial court credible evidence and prove his [Respondent's case], even where the matter proceeded on the basis of a formal proof.

47. It is common ground that the burden cast upon the Respondent was not lessened merely because the Appellant herein [who were the Defendants] in the subordinate court did not attend court and/or adduce any evidence to controvert the Respondents testimony. Instructively, the legal burden of proof rested with the Respondent and the Respondent could only succeed on his case upon discharging the burden of proof. See Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.

48. The legal position that the Plaintiff [now the Respondent herein] was obliged to prove his case even where the adverse party neither entered appearance nor filed a statement of defence has been underscored in a plethora of cases.

49. Pertinently, the Court of Appeal in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, stated and observed thus;

> With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence , when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the *Evidence Act* to be demanding of a party like the 1st respondent that:
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> > "The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."

50. The Supreme Court of Kenya [the apex court] has also heard an occasion to elaborate on the necessity of the claimant to discharge the burden of proof in the first instance. For good measure, the Supreme Court addressed the position in the case of Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment)

> 49. Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
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> 50. This Court in Raila Od*inga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."
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> 51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

51. With the foregoing principles in mind, I now beg to revert to the subject matter and to discern whether the Respondent [who was the Plaintiff in the subordinate court] duly proved his case as pertain to ownership of the suit property. For good measure, it is worth recalling that judgment[s] of the court[s] are neither premised on sympathy or empathy. Instructively, a court of law is obligated to predicate its judgment on the evidence and the applicable law.

52. To start with the Respondent herein contended that same is the bona fide owner of the suit property. In his endeavour to prove the claim of ownership of the suit property, the Respondent placed before the learned trial magistrate four [4] sets of documents, namely, a Part Development Plan [PDP]; sale agreement; payment request/demand for payment of rates and ultimately the report by the County Surveyor dated the 27th October 2022.

53. Premised on the foregoing documentation and coupled with the facts that the Appellants did not attend court and/or produce any evidence, the learned trial magistrate returned a finding that the Respondent was the Bona-fide owner of the suit property.

54. It is imperative to point out and underscore that ownership of land must be predicated and premised on legal documents. For good measure, ownership of land is not premised on just any other document. Pertinently, a court of law must appreciate that the issuance of a declaration of ownership of land, must be well grounded taking into account that such a declaration constitutes a Judgment in rem. [See Section 44 of the *Evidence Act*, Chapter 80 Laws of Kenya].

55. Back to the matter beforehand. Did the Respondent prove ownership of the suit property? Barring repetition, it is not lost on the court that the Respondent's claim is predicated on [sic] a PDP and a sale agreement.

56. It is elementary learning that a PDP is a preliminary document prepared by the directorate of physical planning, upon request by the allocating authority. Furthermore, it is imperative to recall that a PDP is a document that speaks to the availability or otherwise of the designated plot that is the subject of the intended allotment or alienation, whichever is applicable. Further and in any event, a PDP is a precursor/prelude to the issuance of a letter of allotment.

57. To be able to understand the role and place of a PDP in the process of allocation or alienation of land, it suffices to reference the decision of the Supreme Court [the apex Court] in the case of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment); where the Court stated thus:

> 104. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in Nelson Kazungu Chai & 9 others v Pwani University [2014] eKLR as follows:"...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees.
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> 131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed..."

> 105. This process is restated in African Line Transport Co Ltd v Attorney General, Mombasa, HCCC No 276 of 2003 [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.

58. Suffice it to posit that a PDP by and of itself, cannot confer and/or vest any legal rights and/or title to anyone, let alone the Respondent herein. In this regard, it is difficult to comprehend on what basis the learned trial magistrate returned a declaration that the Respondent herein is the bona fide owner of the suit property. Quite clearly, the finding and decision of the learned trial magistrate was erroneous and/or misconceived.

59. Secondly, it is also important to recall that even where a letter of allotment would have been issued in favour of the Respondent, such letter of allotment without more, would not found any legal rights and/or interests over land. Notably, legal rights and interests to land [ownership] only accrue upon the issuance of a letter of allotment, compliance with the terms thereof and the ultimate issuance of a certificate of title, under the relevant law.

60. To this end, I beg to cite and reference the decision of the Court of Appeal in the case of Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] KECA 391 (KLR), where the court stated thus;

> Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.

61. Additionally, it suffices to reference the decision of the Supreme Court of Kenya in the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), where the court held as hereunder;

> 57. The respondent also challenged the letter of allotment on grounds that at the time of its transfer, the conditional thirty (30) days acceptance period had lapsed. As it turned out, the letter was also silent on whose behalf the commissioner of lands had made the allotment. Noting that the Commissioner of Lands by an allotment letter dated December 19, 1999 purported to allocate the suit property to Renton Company Limited. Thereafter, by a letter dated April 25, 2001, Renton Company Limited sought approval from the Commissioner of Lands to transfer the same to the appellant. The appellant's ownership is traced back to this allotment Letter even if subsequently registered under the Registration of Titles Act cap 281 (Repealed) on April 26, 2001.
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> 58. So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others *CA 60/1997* [unreported]; and in Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated

this principle as follows:"It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all " [Emphasis added].

62. While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.

62. Back to the facts of this case, the allotment letter issued to Renton Company Limited was subject to payment of stand premium of Kshs 2,400,000.00, annual rent of Kshs 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.

62. Surely, if a letter of allotment by and of itself cannot vest and/or confer legal rights upon the allottee, then the million-dollar question is whether a Part Development Plan [PDP], which is the document relied upon can vest any legal rights and/ or Interest[s] upon the Respondent.

63. To my mind, the declaration that was proclaimed and retuned by the learned trial magistrate was erroneous and made on quick sand. I am afraid that the Respondent did not prove his claim as pertains to ownership of the suit property.

64. Next is the issue of whether the sale agreement by and of itself could vest upon the Respondent any ownership rights over and in respect of [sic] the suit property. Firstly, there is no gainsaying that the vendor of [sic] the suit property could only sell to the Respondent the suit property if same [suit property] had hitherto been allocated unto him and thereafter same [vendor] complied with the terms of the allotment. In any event, it would still have been incumbent upon the vendor to procure and obtain the requisite certificate of title.

65. In the absence of the requisite letter of allotment, compliance with the terms thereof and ultimate issuance of certificate of title, the vendor who purportedly sold the land to the Respondent had nothing capable of being conveyed. Instructively, the doctrine of nemo dat quod non habet become[s] relevant and applicable.

66. Other than the foregoing, it is also imperative to state that the other sets of documents were the payment request/demand for rates. Can such document found and anchor a claim for ownership of land?.

67. The answer to the question posed in the foregoing paragraph is traceable and discernible from the decision of the Court of Appeal in the case of Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR, where the court stated thus;

> What is not shown is the date on which H.E. the President approved the application for consideration for allocation of the suit property. Mr. Otieno-Kajwang who appeared for the applicant argued that the approval by H.E. the President amounted to his client obtaining the title to the suit property. This argument, of course, cannot stand

68. In my humble, albeit considered view, if an application letter marked as approved by His Excellency [H.E] the President who was tasked with the mandate to alienate land under the Government *Land Act* [now repealed] could not amount to title; then what about payment request/demand for rates?

69. Without belabouring the point, I am at pains as to how the learned trial magistrate came to and/ or arrived at the conclusion that the Respondent was the bona fide owner of the suit property. Yet again, I reiterate that a declaratory order has far reaching legal consequences and therefore same ought not to be issued lightly and without due consideration of the relevant law.

70. Finally, I beg to say something on the report by the County Surveyor dated the 27th October 2022 and which was deployed by the learned trial magistrate in arriving at the impugned judgment. It is important to point out that the report beforehand was neither tendered nor produced before the court by the maker. Being an expert report, it was incumbent upon the Respondent to call the maker thereof so as to shed light on the report.

71. Be that as it may, it is not lost on the court that the report under reference was tendered and produced by the Respondent himself. Though admitted by the court, it must be recalled that the mere admission of the document does not translate into proof of the document. Furthermore, it is also imperative to underscore that a court of law would still be obliged to discern whether or not the impugned document has probative value.

72. To my mind, the learned trial magistrate does not appear to have appreciated the three distinct aspect[s] turning on the question of admissibility; proof of documents and ultimately the probative value, if any; to be accorded such a document.

73. I beg to cite and reference, the decision in the case of Kenneth Nyaga Mwige v Austine Kiguta Civil Appeal No. 140 of 2008 [2015]eKLR, where the Court of Appeal stated as hereunder;

> " 18. 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.

74. In a nutshell, my answer to issue number one is twofold. Firstly, the burden of proof laid on the Respondent to place before the court plausible and credible evidence to underpin his claim of ownership of the suit property. For coherence, the burden/obligations has to be discharged irrespective of whether the adverse party appeared or not.

75. Secondly, the Respondent [who was the Plaintiff in the subordinate court] did not place before the court any plausible document to warrant a declaration of ownership. Instructively the PDP was incapable of propagating the Respondent's case.

Issue Number 2 Whether the Appellants herein bore any burden of proof, in the matter or otherwise.

76. Having dealt with and disposed of issue number one, it would have been apposite to terminate the judgment and bring the matter to closure. However, it suffices to consider issue number two [2] albeit in brief.

77. The learned trial magistrate appears to have proceeded on the basis that because the Defendant did not plead any claim to any property of their own and coupled with the fact that the Defendant did not prove their case, it was imperative to return a judgment in favour of the Respondent.

78. I beg to state and underscore that in civil proceedings, the burden of proof lies on the claimant. It is the claimant who is tasked with the obligation to place credible evidence before the court in an endeavour to tilt the pendulum in his [claimant's] favour.

79. Conversely, the Defendant has no legal obligation to prove any claim. However, the only time when the Defendant or the Respondent will be called upon to respond is when some semblance of evidence has been placed on record and thus the evidential burden of proof shifts to the Defendant. In any other scenario, the legal burden stands and stops with the claimant.

80. Without belabouring the point, I beg to reference the decision in the case of Agnes Nyambura Munga V. Lita Violet Shepard. (2018) JELR 106273 (CA) Court of Appeal • Civil Appeal 334 of 2013 • 9 Nov 2018, where the court stated thus;

> The burden of proving the existence of any fact lies with the person who makes the assertion. That much is clear from Sections 107 and 109 of the *Evidence Act*. The standard of proof is on a balance of probabilities which Lord Denning in the case of Miller v. Minister of Pensions (1947) explained as follows:-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

81. Simply put, the Appellants herein could only be provoked into responding/reacting to the evidence tendered, if the Respondent had discharged the evidential burden of proof in the first instance. Other than the foregoing, the Appellants herein could as well sit pretty and invoke the provision of Section 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.

Final Disposition:

82. Flowing from the discourse [details highlighted in the body of the judgment], it must have become apparent that the appeal beforehand is meritorious. However, I must clarify that the appeal beforehand has succeeded on the basis of legal issues that were neither canvassed nor highlighted by the Appellants.

83. In the circumstances, the final orders that commend themselves to the court are as hereunder;

    i. The Appeal be and is hereby allowed.

    ii. The Judgment of the trial court dated the 28th November 2023 be and is hereby set aside.

    iii. The Respondent's suit in the subordinate court be and is hereby Dismissed.

    iv. Easch party shall bear own cost of the suit in the subordinate court

    v. Each party shall also bear own costs of the Appeal

84. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 13TH DAY OF FEBRUARY 2025.

OGUTTU MBOYA

JUDGE.

In the presence of

Mutuma Court Assistant

Mr. Mawira for the Appellants.

Mr. Muchiri for the Respondent.