



**Gache & 2 others v Bonyo & 5 others (Environment & Land Case  
3 of 2014) [2025] KEELC 1432 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1432 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 3 OF 2014  
SO OKONG'O, J  
MARCH 20, 2025**

**BETWEEN**

**GEORGE OTIENO GACHE ..... 1<sup>ST</sup> PLAINTIFF  
COVENANT OF PEACE CHURCH ..... 2<sup>ND</sup> PLAINTIFF  
THE REGISTERED TRUSTEES OF COVENANT OF PEACE  
CHURCH ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JUDITH AKINYI BONYO ..... 1<sup>ST</sup> DEFENDANT  
JOSHUA OMOLLO ..... 2<sup>ND</sup> DEFENDANT  
RICHARD OTIENO ..... 3<sup>RD</sup> DEFENDANT  
JAMES OTIENO ..... 4<sup>TH</sup> DEFENDANT  
THE CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT  
THE NATIONAL LAND COMMISSION ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs brought this suit against the Defendants on 13<sup>th</sup> January 2014. The plaint was amended on 8<sup>th</sup> December 2020 to add the 3<sup>rd</sup> Plaintiff as a party to the suit. In the amended plaint dated 7<sup>th</sup> December 2020, the Plaintiffs sought the following reliefs;
  - a. A declaration that the Plaintiffs were the legally registered owners of all that parcel of land known as Plot No. 15155 Kisumu (hereinafter referred to as “the suit property”).
  - b. Rectification of the register.



- c. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants by themselves or through their agents, servants, employees or any other person claiming through them from entering, remaining on or erecting any structures within the boundaries of the suit property.
  - d. General damages for fraud and malicious damage to property.
  - e. Costs of the suit.
2. The Plaintiffs averred that they were the registered proprietors of the suit property which was allocated to them by the Commissioner of Lands on 15<sup>th</sup> May 1991. The Plaintiffs averred that the letter of allotment that was issued to them by the Commissioner of Lands was confirmed by the 6<sup>th</sup> Defendant as genuine.
  3. The Plaintiffs averred that in breach of its statutory duty, the 6<sup>th</sup> Defendant purported to issue the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants with another letter of allotment in respect of the suit property. The Plaintiffs averred that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants thereafter fraudulently obtained registration as the owners of the suit property.
  4. The Plaintiffs averred that in the exercise of its mandate, the 6<sup>th</sup> Defendant nullified and cancelled the lease that had been issued to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in respect of the suit property after finding that the same was issued fraudulently since the suit property belonged to the Plaintiffs.
  5. The Plaintiffs averred that in an attempt to evict the Plaintiffs from the suit property, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants broke the Plaintiffs' gate and defaced the walls around the suit property.
  6. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a joint statement of defence and counter-claim on 23<sup>rd</sup> July 2021. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants denied that the Plaintiffs were issued with an allotment letter dated 15<sup>th</sup> May 1991 by the Commissioner of Lands and that the Plaintiffs were the registered owners of the suit property. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that they were the registered proprietors of the suit property. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that there was no way in which the 2<sup>nd</sup> Plaintiff which was registered on 21<sup>st</sup> September 2010 could have been allocated the suit property on 15<sup>th</sup> May 1991. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that the purported letter of allotment was a forgery.
  7. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that at all material times, they had been the owners of the suit property and had had peaceful occupation of the same. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that the 6<sup>th</sup> Defendant issued them with a letter of allotment for the suit property and after they fulfilled the conditions for the allotment, they were registered as the owners of the suit property and issued with a certificate of title on 9<sup>th</sup> December 2013.
  8. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants denied that the 6<sup>th</sup> Defendant cancelled their title to the suit property and declared the Plaintiffs as the owners of the property. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that the purported letter by the 6<sup>th</sup> Defendant cancelling their title and confirming the Plaintiffs as the owners of the suit property was irregularly and fraudulently issued.
  9. In their counter-claim, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that they were the lawful proprietors of the suit property having been issued with a Grant in respect thereof by the Government of Kenya on 1<sup>st</sup> March 1996 for a term of 99 years. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that after satisfying the conditions for the allocation, they were issued with Grant No. I.R 151210. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that they had been paying land rent and rates for the property although it was the



- Plaintiffs who were in possession of the property courtesy of a court order issued on 13<sup>th</sup> January 2014 that removed the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants from the suit property.
10. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that they were the registered owners of the suit property notwithstanding the alleged letter of allotment that was issued to the Plaintiffs in respect of the property. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that the Plaintiffs used and abused the ex parte court orders that they obtained on 13<sup>th</sup> January 2014 to develop the suit property.
  11. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants prayed for judgment against the Plaintiffs by way of a counter-claim for;
    - a. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were the lawful owners and registered proprietors of the suit property.
    - b. A declaration that the letter purportedly issued by the 6<sup>th</sup> Defendant to the contrary was invalid and void for all purposes.
    - c. An order of eviction of the Plaintiffs and removal of any developments that they had on the suit property at their costs.
    - d. A permanent injunction restraining the Plaintiffs by themselves, their agents, employees, members, tenants and any person acting under them from accessing, trespassing on and /or interfering with the suit property in any manner whatsoever.
    - e. Costs of the suit.
  8. The Plaintiffs filed a reply to defence and defence to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' counter-claim on 14<sup>th</sup> June 2023. The Plaintiffs averred that the 2<sup>nd</sup> Plaintiff was in existence when it was issued with the letter of allotment and was operating as an affiliate of United International Life Ministry of Churches which was registered in 1983. The Plaintiffs denied that the letter of allotment that was issued to the 2<sup>nd</sup> Plaintiff was a forgery. The Plaintiffs reiterated that if there was a letter of allotment issued to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants then it was a forgery.
  9. The Plaintiffs reiterated that the 6<sup>th</sup> Defendant nullified the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' title and upheld the Plaintiffs' letter of allotment. The Plaintiffs denied that the proceedings of the 6<sup>th</sup> Defendant through which the 6<sup>th</sup> Defendant cancelled the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' title and upheld the Plaintiffs' title to the suit property were irregular and fraudulent.
  10. At the trial, the Plaintiffs called GEORGE ODHIAMBO GWALA (PW1) as their sole witness. PW1 told the court that he was a member of the board of the 2<sup>nd</sup> Plaintiff and also the 2<sup>nd</sup> Plaintiff's Assistant General Secretary. He adopted his witness statement dated 5<sup>th</sup> June 2023 as part of his evidence in chief and produced the documents attached to the Plaintiffs' list of documents filed on 20<sup>th</sup> February 2023 as a bundle as P.EXH.1 and the documents attached to the Plaintiffs' further list of documents filed on 5<sup>th</sup> June 2023 as a bundle as P.EXH.2. PW1 stated further as follows: The 2<sup>nd</sup> Plaintiff had been in existence since 1990 and was affiliated to United International Life Ministry of Churches (United Church). The National Land Commission (NLC) sat and heard the Plaintiffs and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants before making a decision on the dispute over the suit property. Both parties were represented by an advocate. The NLC's determination was that the suit property belonged to the 2<sup>nd</sup> Plaintiff. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not attend the session before the NLC but they were represented by an advocate who addressed the NLC.



11. PW1 stated further that the decision of the NLC was not challenged. He stated that the letter dated 26<sup>th</sup> November 2014 at page 65 of D.EXH. 1 confirmed that the allocation of the suit property to the 2<sup>nd</sup> Plaintiff had been confirmed by the NLC. He stated that the 2<sup>nd</sup> Plaintiff had developed the suit property. He stated that the suit property housed; a resource centre which had a training centre for widows and orphans, a medical centre, a school and a church building. He stated that the 2<sup>nd</sup> Plaintiff moved to the suit property in 2014. He stated that the suit property was thereafter invaded by armed people who destroyed nearly everything on the property. PW1 stated that the suit property was owned by the 2<sup>nd</sup> Plaintiff and that it was the 2<sup>nd</sup> Plaintiff which was in possession thereof.
12. PW1 stated that the 2<sup>nd</sup> Plaintiff applied to be allocated the suit property, the application was allowed and it was issued with a letter of allotment. He stated that the letter of allotment that was issued to the 2<sup>nd</sup> Plaintiff was not a forgery and that the development on the property was approved by the County Government of Kisumu. PW1 urged the court to grant the reliefs sought in the amended plaint.
13. After the close of the Plaintiffs' case, the 1<sup>st</sup> Defendant, JUDITH ATIENO BONYO(DW1) gave evidence as the Defendants' sole witness. DW1 told the court that she was giving evidence on her own behalf and on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. She adopted her witness statement dated 19<sup>th</sup> July 2021 as part of her evidence in chief and produced the documents attached to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' list of documents dated 19<sup>th</sup> July 2021 as a bundle as D.EXH.1 and the documents attached to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' list of documents dated 30<sup>th</sup> May 2023 as a bundle as D.EXH.2. DW1 stated that none of them appeared before the NLC for a hearing concerning the dispute over the suit property either in person or through an advocate. DW1 stated that they were not served with the 6<sup>th</sup> Defendant's determination and as such they were not aware that their title was revoked.
14. After the close of evidence, the parties were directed to make closing submissions in writing. The Plaintiff filed submissions dated 18<sup>th</sup> November 2024. I have not seen the submissions by the Defendants in the CTS. The Plaintiffs submitted that their title to the suit property was protected under Article 40(1) of *the Constitution* of Kenya and Section 26 of the *Land Registration Act* 2012. The Plaintiffs submitted that the documents of title that were produced in evidence by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants had been cancelled by the National Land Commission (NLC). The Plaintiffs submitted that having proved that they were the registered owners of the suit property, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' attempt to evict the Plaintiffs from the suit property amounted to trespass. The Plaintiffs submitted that they were entitled to damages for trespass. The Plaintiffs urged the court to award them Kshs. 20,000,000/- as general damages for trespass and malicious damage to property.
15. The Plaintiffs submitted further that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were hostile and were on a rampage and had treated the Plaintiffs with a lot of disdain. The Plaintiffs submitted that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' conduct could only be contained by an order of injunction.
16. The Plaintiffs submitted that they had proved their case against the Defendants to the required standard. The Plaintiffs submitted that having proved their title to the suit property, the evidential burden of proof shifted to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants who claimed that they were the owners of the suit property to prove that claim. The Plaintiffs submitted that the NLC had found the letter of allotment that was the basis of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' title fraudulent. The Plaintiffs submitted that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not challenge the decision of the NLC through judicial review. The Plaintiffs submitted that the said decision of the NLC remained unchallenged.



17. The Plaintiffs submitted that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' counter-claim was an afterthought and in any event time-barred as it was based on fraud and was brought 7 years after the occurrence of the alleged fraud. The Plaintiffs submitted further that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not prove the alleged fraud to the required standard. The Plaintiffs submitted that although the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants claimed that the signature of Mrs. Amiani in the Plaintiffs' letter of allotment was forged, the said land officer was not called as a witness to dispute her alleged forged signature. The Plaintiffs cited several authorities in support of their submissions which the court has considered. The Plaintiffs urged the court to enter judgment in their favour as prayed in the amended plaint.

### **Analysis and Determination**

18. I have considered the pleadings, the evidence tendered and the written submissions by the advocates for the Plaintiffs. The parties did not agree on the issues for determination by the court. In my view, the issues arising for determination in the main suit and the counter-claim are as follows;
- a. Who owns the suit property as between the Plaintiffs and, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants?
  - b. Whether the Plaintiffs are entitled to the reliefs sought in the amended plaint;
  - c. Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are entitled to the reliefs sought in their counter-claim; and
  - d. Who is liable for the costs of the suit and the counter-claim?

I will consider these issues serially.

### **Who owns the suit property as between the Plaintiffs and, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants?**

19. In *Hubert L. Martin & 2 Others v. Margaret J. Kamar & 5 Others*[2016] eKLR, the court stated as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain...Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

20. In *Adan Abdirahani Hassan & 2 others v. Registrar of Tiles & 2 others* [2013] eKLR, the court stated as follows:

“20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that *the Constitution* protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by *the*



Constitution, he must show that he has followed the due process in acquiring that which he wants to be protected.”

21. In *Samuel Kamere v. Land Registrar Kajiado*, Nairobi Court of Appeal, Civil Appeal No. 28 of 2005, the court while addressing the issue of competing titles stated that:

“It is evident that there are two competing claims over the suit property, and we have said that the plaintiff’s proprietary interest is already established. Since the appellant’s title is under challenge, in order to be considered a bona fide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”

22. It is common ground that the suit property is owned by the Government of Kenya as the freehold proprietor thereof. The Plaintiffs’ case is that the Government of Kenya through the Commissioner of Lands allocated to the 2<sup>nd</sup> Plaintiff the suit property through a letter of allotment dated 15<sup>th</sup> May 1991. The Plaintiffs averred that they accepted the terms of the allotment and paid the requisite fees on 9<sup>th</sup> October 2013. The Plaintiffs have claimed that while they were waiting for the title for the suit property to be processed in favour of the 2<sup>nd</sup> Plaintiff, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants fraudulently obtained a purported letter of allotment for the same property dated 27<sup>th</sup> February 1996 which they used to be registered as the owners of the suit property.

23. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants’ case is that the Government of Kenya through the Commissioner of Lands allocated the suit property to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants through a letter of allotment dated 27<sup>th</sup> February 1996. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that they accepted the allotment and paid the requisite charges on 28<sup>th</sup> November 2013. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants averred that they were subsequently issued with a Grant No. I.R 151210 for the suit property on 9<sup>th</sup> December 2013 which Grant was registered on 10<sup>th</sup> December 2013.

24. It is clear from the foregoing that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have a title for the suit property while the 2<sup>nd</sup> Plaintiff has only a letter of allotment. The suit property was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). Section 23 of the Registration of Titles Act provides as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

25. Section 26 of the Land Registration Act 2012 which repealed the Registration of Titles Act, provides as follows:

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the



absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

26. The court is enjoined under Section 23 of the Registration of Titles Act (now repealed) and Section 26(1) of the *Land Registration Act* 2012 to take the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants’ Grant as conclusive evidence that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the absolute and indefeasible owners of the suit property unless it is proved that the Grant was acquired through fraud, misrepresentation, illegality, procedural impropriety or corrupt scheme. The burden was on the Plaintiffs to prove that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants acquired the suit property through fraud, misrepresentation, illegality, procedural impropriety or corrupt scheme.

27. In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another*[2000]eKLR, the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

28. In *Railal Gordhanbhai Patel v. Lalji Makanji* [1957] E.A 314, the court stated as follows at page 317:

“Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

29. In *Republic v. City Council of Nairobi & 3 others* [2014] eKLR, the court stated as follows:

“From the case as presented by the Applicant they no doubt had beneficial interest in the suit plot. As was held by Warsame, J (as he then was) in *Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another* Kisumu HCCA No. 9 of 2004 once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”



30. In *Kamau James Njendu v. Serah Wanjiru & another* [2018] eKLR the court stated as follows:

“In essence therefore I find that there could have been double allotment of the suit land and the blame would therefore lay squarely on the Settlement Fund Trustee. In the case of *M’ikiara M’Rinkanya & Another –v- Gilbert Kabeere M’Mbijiwe*, (1982-1988) 1KAR 196, the court held that where there was a double allocation of land, the first allotment would prevail. That therefore there was no power to allot the same property again.”

31. In *Benja Properties Limited v. Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, the Court of Appeal cited with approval the High Court case, *Gitwany Investment Limited v. Tajmal Limited & 2 others* [2006] eKLR where the court stated that:

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs. commissioner of Lands*, C.A. No. 71/1997 (unreported) “– is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in *Faraj Maharus vs. J.B. Martin glass Industries and 3 others* C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity....”

32. Section 3(a) of the Government Lands Act, Chapter 280 Laws of Kenya (now repealed) provides that:

“The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

- (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;”

33. The Commissioner of Lands could only allocate unalienated government land. Assuming that the allocation of the suit property to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants was lawful, the question that must be answered is whether the suit property was unalienated government land when it was purportedly allocated to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants on 27<sup>th</sup> February 1996 and a title subsequently issued to them on 9<sup>th</sup> December 2013? My answer is that once the suit property was allocated to the 2<sup>nd</sup> Plaintiff on 15<sup>th</sup> May 1991, the property was no longer unalienated government land unless the allotment was cancelled by the Commissioner of Lands. There is no evidence that the letter of allotment issued to the 2<sup>nd</sup> Plaintiff was cancelled. Although the allotment was supposed to be accepted and payment made within 30 days, the payment that was made by the 2<sup>nd</sup> Plaintiff for the same on 9<sup>th</sup> October 2013 was accepted by the Commissioner of Lands since the allotment had not been cancelled. I must say that if the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants had accepted their allotment of 27<sup>th</sup> February 1996 and made payment before the 2<sup>nd</sup> Plaintiff had accepted its allotment and made payment, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants’ allotment would have taken priority over the 2<sup>nd</sup> Plaintiff’s allotment. In this case, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants accepted their allotment of 27<sup>th</sup> February 1996 and made payment on 28<sup>th</sup> November 2013 after the 2<sup>nd</sup> Plaintiff had already accepted its allotment and made payment. Since the 2<sup>nd</sup> Plaintiff had already accepted the allotment and made the payment before the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants had accepted their allotment, the suit property was not available for allocation to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup>



Defendants and their payment made on 28<sup>th</sup> November 2013 should not have been accepted by the Commissioner of Lands. The 2<sup>nd</sup> Plaintiff's allocation was the first in time and it was the 2<sup>nd</sup> Plaintiff who was the first to accept the allotment of the suit property by making the necessary payment. The processing of the title for the suit property in favour of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants was in the circumstances irregular and unprocedural.

34. The Plaintiffs had contended that the letter of allotment purportedly issued to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants was not only irregular but was also fraudulent. The letters of allotment in favour of the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were issued by the Commissioner of Lands. Following the promulgation of the new Constitution of Kenya, the functions and role of the Commissioner of Lands were taken over by the National Land Commission (NLC). It is now the NLC which is the custodian of all records relating to allocation of public land. The parties herein have accused each other of obtaining allotment of the suit property fraudulently. The 2<sup>nd</sup> Plaintiff took the dispute between the parties to the NLC for resolution. I am convinced from the evidence on record that the NLC heard the parties and determined the dispute on 14<sup>th</sup> March 2018. The NLC found that according to the records held by them, there was no evidence that the suit property had been allocated to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The NLC found that the suit property had been allocated to the 2<sup>nd</sup> Plaintiff under file No. 174147 which was available at the Ministry of Lands. The NLC directed the Chief Land Registrar to cancel the title for the suit property that had been issued to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and to register the property in the name of the 2<sup>nd</sup> Plaintiff. The NLC's determination was published in the Kenya Gazette No. 11714 on 9<sup>th</sup> November 2018. The said determination was produced in evidence by the Plaintiffs. The court did not believe DW1 when she claimed that she was not aware of the NLC's determination. In her witness statement, DW1 referred to the proceedings before NLC but claimed that there was no hearing a position that was rebutted by the published determination by the NLC. This court is not bound by the said determination by the NLC but taking into account that none of the parties called a witness from the NLC or the Ministry of Lands in defence of their respective letters of allotment and the fact that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not challenge the said determination by the NLC, the court finds it of evidential value of some weight on the issue before it. The said determination considered with the other evidence produced by the Plaintiffs supports the Plaintiffs' contention that the letter of allotment purportedly issued to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants was irregular, unprocedural, fraudulent and unlawful.
35. For the foregoing reasons, it is my finding that the title held by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in respect of the suit property is tainted with fraud, misrepresentation, illegality, procedural impropriety and as such, the same is null and void. The 2<sup>nd</sup> Plaintiff which was the first to be allocated the suit property and had accepted the allotment, made the payment and took possession of the suit property is the lawful beneficial owner of the suit property. In my view, nothing turns on the issue whether or not the 2<sup>nd</sup> Plaintiff was in existence at the time it was allocated the suit property. I am satisfied with the explanation that has been given by PW1 regarding the status of the 2<sup>nd</sup> Plaintiff at the time the suit property was allocated to it. In any event, that would only have become an issue if the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants had established that they have a lawful or valid interest in the suit property which is not the case given my findings above.

#### **Whether the Plaintiffs are entitled to the reliefs sought in the amended plaint**

36. I have set out earlier in the judgment the reliefs sought by the Plaintiffs. It is my finding from what I have stated above that the Plaintiffs have proved their case against the Defendants on a balance of probabilities. The Plaintiffs are therefore entitled to a declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are the beneficial owners of the suit property. The Plaintiffs are also entitled to a permanent injunction



restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants from interfering with their possession and enjoyment of the suit property. The Plaintiffs are however not entitled to general damages. The Plaintiffs did not prove that those who invaded the suit property and caused destruction to the fence were the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants or their agents. The Plaintiffs did not also prove that they suffered any damage. I find no basis for the award of Kshs. 20,000,000/- sought by the Plaintiffs. On the issue of costs, I will award the Plaintiffs the costs of the suit.

**Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are entitled to the reliefs sought in their counter-claim**

37. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have not proved their counter-claim against the Plaintiffs. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have not proved that they are the lawful owners of the suit property. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are therefore not entitled to any of the reliefs sought in their counter-claim against the Plaintiffs.

**Conclusion**

38. In conclusion, I hereby enter judgment for the Plaintiffs against the Defendants for:

- a. A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are the beneficial owners of the parcel of land situated in Kisumu known as L.R No. 15155.
- b. An order for the 5<sup>th</sup> Defendant to cancel the registration of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants as the owners of the parcel of land situated in Kisumu known as L.R No. 15155 and Grant No. I.R. 151210 issued to them and registered as I.R No. 151210/1.
- c. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants by themselves or through their agents, servants and/or employees from entering, remaining on or erecting any structures on the parcel of land situated in Kisumu known as L.R No. 15155.
- d. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' counter-claim is dismissed.
- e. The Plaintiffs shall have the costs of the suit and the counter-claim.

**DELIVERED AND DATED AT KISUMU ON THIS 20<sup>TH</sup> DAY OF MARCH 2025**

**S. OKONG'O**

**JUDGE**

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mwamu for the Plaintiffs

Ms. Ashioya for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants

N/A for the 5<sup>th</sup> Defendant

Ms. Jumba for the 6<sup>th</sup> Defendant

Ms. J. Omondi-Court Assistant

