



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC CIVIL SUIT NO 144 OF 2010**

**ANNA NGO'NDU KASAMU & LYDIA MUSEMBI (Suing as the personal representatives of  
David Kasamu Musembi deceased).....PLAINTIFFS**

**VERSUS**

**NYAGOTO INVESTMENT COMPANY LIMITED.....DEFENDANT**

**JUDGMENT**

1. This suit was commenced by way of a Plaint dated 19<sup>th</sup> July 2010 against the Defendant seeking the following reliefs:

*i. A declaration that the Plaintiff is the lawful and bona-fide allottee and owner of all that plot known as L.R. NO. 20507 (formerly known as unsurveyed Residential Plot No. 108) situated in Athi-River (Municipality) and measuring approximately 1.0 hectares and should be registered as such owner.*

*ii. An order that registration of the Defendant as the owner of the plot known as L.R. NO. 20507 (formerly known as unsurveyed Residential Plot No. 108) situated in Athi-River (Mavoko Municipality) and measuring approximately 1.00 hectares be cancelled, and the Plaintiff be registered as the owner of the said property.*

*iii. A permanent order of injunction restraining the Defendant, its agents and/or servants from entering into the plot known as L.R. NO. 20507 (formerly known as unsurveyed Residential Plot No. 108) situated in Athi-River (Mavoko Municipality) and measuring 1.0 Hectares, and putting up structures thereon, selling, transferring, charging, leasing, sub-dividing or in any other way interfering with the said plot.*

*iv. Costs of the suit to be paid by the Defendant.*

2. The original Plaintiff died sometime in 2015 and the suit was taken over by his widows, who are his legal representatives. In the Plaint, the Plaintiffs averred that vide a letter of allotment dated 3<sup>rd</sup> December 1993, the Government of Kenya, through the Commissioner of Lands, allocated the original Plaintiff herein (David Kasamu Musembi) an unsurveyed Residential Plot No. 108 – Athi River measuring 1.0 hectares.

3. The Plaintiffs averred in the Plaint that they accepted the said allotment and duly paid to the Commissioner of Lands all the required stand premiums, land rents/rates, survey fees and all other necessary payments, which transaction between themselves and the government was documented as sale number 155961.

4. According to the Plaintiffs, upon accepting the allotment and commencing payments as aforesaid, they took possession and occupation of the suit property and fenced it off in or about the year 1994; that they then awaited the processing of the title/lease documents of the suit property before he could start further developments on the land; that he later discovered that sometime in the year 2002, the Defendant had caused the suit property to be surveyed as L.R 20507 (Land survey Plan No. 243596) and a title document issued to it on or about 30<sup>th</sup> August 2002 and that the purported allotment and registration of the suit property in the Defendant's name is fraudulent and marred with irregularities. According to the Plaintiffs, the deceased is the rightful allottee of the suit property.

5. In its Defence and Counterclaim, the Defendant denied that it fraudulently and irregularly caused the survey and registration of L. R No.20507; that the mere allotment of a parcel of land without more is not proof of ownership and that any claim with respect to the said allocation ought to have been directed at the Commissioner of Lands and not the Defendant. In the Counter-claim, the Defendant has sought for an injunction against the Plaintiff to restrain him from dealing with the suit property in any way, general damages and costs of the suit.

## **The Plaintiffs' Case**

6. The matter proceeded for hearing on the 16<sup>th</sup> of September 2020. PW1, one of the widows of the deceased and co administrator of his estate stated that vide a letter of allotment dated 3<sup>rd</sup> November 1993 reference number 39711/xx, the deceased was offered the property known as L.R No 108 measuring 1.0HA; that the allotment letter indicated that he was to accept the offer within 30 days and pay the sum of Kshs 45,317; that the deceased accepted the offer vide the letter dated 28<sup>th</sup> December 1993 and paid Kshs 5,317 as part payment, which payment was received.

7. PW1 stated that on 14<sup>th</sup> March 1994, the deceased wrote to the Commissioner of Lands forwarding two cheques for the sums of Kshs 3000 and Kshs 24,000 being further payments; that he was issued with a receipt for the said amount dated 6<sup>th</sup> April 1994 sale number 155961 and that the deceased was issued with two letters dated 14<sup>th</sup> of March 1994 acknowledging receipt of the sums of Kshs 3000 and Kshs 24,000/= respectively.

8. According to PW1, despite the deceased having accepted the offer and paid for the plot, there was delay in the issuance of the title documents leading him to seek for the assistance of a private surveyor, one Mr. Wafula, who found out that the plot had been allocated to someone else in the year 1999 and another file opened in the names of James Ongwae.

9. It was the evidence of PW1 that the new file had plot no 236899 which was for plot no 108 (the suit property); that a search conducted at the lands registry revealed a title of the suit property had been issued in the name of Nyagoto Investments Limited being L.R No 20507; that a further search at the companies' registry showed that Nyagoto Investments was a business name and that Nyagoto Investments Limited came into being later on.

10. PW1 was categorical that the deceased never surrendered the land to the government nor was it repossessed; that by the time of the purported allotment of the suit property to the Defendant in 1999, the deceased already owned the property and was waiting to be issued with the title deed; that as the deceased awaited for the issuance of the title deed, he had fenced off the property and that the deceased discovered about the issuance of the title to the Defendant in 2010.

11. On cross-examination, PW1 admitted that some portions of the allotment letter were handwritten; that she was not unaware of the precise date the deceased was given the allotment letter; that with regards to the letter of 28<sup>th</sup> December 1993, it was delivered by the deceased to the Commissioner of Lands and received and that she does not know why the receipt was issued on 21<sup>st</sup> January 1994.

12. It was the evidence of PW1 in cross examination that the impressions on the stamps in the letter adduced by the deceased vide his supporting affidavit of 19<sup>th</sup> July 2010 and PEXB 4 and those of the bankers cheques are different and that she did not know why the bankers cheques were banked in Nairobi. On re-examination, PW1 re-affirmed that all the bankers cheques were cashed in favour of the government and that the government issued the deceased with receipts thereof.

## **The Defence Case**

13. DW1 informed the court that he is a director of the Defendant company; that the Defendant was issued with a letter of allotment dated 5th January 1999, by the Commissioner of Lands in respect to the suit property; that the Defendant issued a cheque dated 18<sup>th</sup> June 2002 in favour of the Commissioner of Lands for Kshs 56,910 for the land, whereupon a receipt dated 20<sup>th</sup> June 2002 was issued and that a title deed for I.R 89644, L.R No. 20507 was issued to the Defendant.

14. DW1 informed the court that the Certificate of Incorporation of the Defendant was issued on 21st May 1997. DW 1 stated that DEXHB 1 was a letter of offer addressed to Nyagoto investments; that the last paragraph of the letter provides that the full names of the Allotee is to be provided for the purpose of the Grant to be submitted later; that Plot No 108 does not exist as upon survey the number changed to L.R No 20507 and the Defendant has the grant number 89644 for the said land and that the Defendant is in possession of the land and the suit should be dismissed with costs.

15. On cross-examination, DW I stated that James Elvis Ongwae was his father and a co-director of the Defendant alongside two other directors; that he became a director of the Defendant sometime in 1999; that although he was aware of the existence of Nyagoto Investments, he was not aware of who it's proprietor was then, and when it was registered, and when it stopped transacting and that he was not a director of the Defendant as at the time of its incorporation.

16. DW1 stated that the word "limited" was omitted in the letter of allotment dated 5th January 1999 which was addressed to Nyagoto investments and that he was not aware that the same land had been allocated in 1993 to the Plaintiff.

17. DW I informed the court that on being issued with the letter of allotment, they were supposed to accept the offer within 30 days, which they did; that he did not have the letter signifying acceptance of the offer and that the cheque drawn in favour of the Commissioner of Lands was drawn three years after the letter of allotment was issued and outside the 30 days' acceptance period. According to DW1, the delay in making payments was occasioned by the lands office.

18. DW1 informed the court that he became aware of the Plaintiffs' claim when the suit was filed in 2010; that although the Plaintiff is claiming that all the monies in respect of the letter of allotment had been paid, he did not fulfill all the conditions in the letter of offer and that the Plaintiffs should be restrained from trespassing on the suit property.

## **Submissions**

19. The Plaintiffs' counsel submitted that the Defendant has no pleadings on record; that the Defendant's Defence and Counter- Claim filed in Court on 3<sup>rd</sup> of September 2015 stands struck out after the Defendant failed to comply with the Court's Orders dated 6<sup>th</sup> February 2015 and that despite the same having been admitted on record, the subsequent orders dated 16<sup>th</sup> October 2017 did not save the situation as the Defendant had not sought for the reinstatement of its pleadings.
20. It was submitted by the Plaintiffs' advocate that the Defendant did not rebut the allegations and evidence of fraud against it; that the purported letter of allotment dated 1<sup>st</sup> September 1999 was issued to Nyagoto Investments, a Business Name, which ceased to exist on 21<sup>st</sup> August 1997; that no evidence was adduced to show how that the suit property was allocated to the Defendant herein, Nyagoto Investment Limited; that Nyagoto Investment and Nyagoto Investments Limited are different entities, registered under two different legal regimes.
21. It was submitted on behalf of the Plaintiffs that DW1 admitted under cross-examination that he is a son of James Elvis Omariba Ongwae, the sole proprietor of Nyagoto Investments, who was allotted the suit property; that DW1 also admitted that whereas the letter of allotment was issued to Nyagoto Investments on 1<sup>st</sup> of September 1999, payment of the stand premiums on the same was not made to the Commissioner of Lands until 20<sup>th</sup> June 2002, three (3) years down the line, and that a title deed/document was issued to the Defendant on 30<sup>th</sup> August 2002, less than two (2) months from the date of payment.
22. Counsel submitted that DW1 further admitted that the payment receipt exhibited by the Defendant dated 20<sup>th</sup> June 2002 was issued in the name of Nyagoto Investments, being a non-existent Business Name as at that date and that an application for registration of the suit property was made by the Defendant company herein on 30<sup>th</sup> August 2002 and the Title /Lease document was issued to the Defendant on the same date.
23. On the question of whether there was double allocation of the suit property, Counsel submitted that there was only one valid allocation of the suit property being that to the Plaintiff and that the allotment of the suit property to Nyagoto Investments on 1<sup>st</sup> of September 1999 was void and invalid, because Nyagoto Investments did not exist on the date of the purported allotment.
24. With respect to whether the Defendant's title could be revoked and/or cancelled, counsel cited **Section 26 of the Registration of Titles Act** which provides as follows: -
- “the certificate of title issued by the registrar to a purchaser of and upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute 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 ground of misrepresentation to which he is proved to be party”.**
25. Counsel stated that the above provision was re-stated by the Court of Appeal in the case of **Wreck Motor Enterprises Limited vs Commissioner of Lands and 3 Others [1997] eKLR.**
26. According to counsel, the Defendant, while knowing that it had never been allocated the suit property, fraudulently made an application for registration of the said property in its favour on 30<sup>th</sup> August 2002, and went ahead to fraudulently obtain the impugned Certificate of Title thereon on the same date.
27. The Defendant, through its counsel, submitted that there is no allegation by the Plaintiff that the letter of allotment dated 5<sup>th</sup>, January 1999 and the Defendant's other documents, namely the cheque for Kshs.56, 910 dated 18<sup>th</sup> June 2002, the receipt issued on 20<sup>th</sup> June 2002 for Kshs. 56,910, the application for registration stamped on the 30<sup>th</sup> August 2002 and the Grant issued on 30<sup>th</sup> August 2002 were fraudulent. Counsel submitted that these are genuine and authentic government documents in respect of the suit land.
28. With respect to the Plaintiffs' allegation that the Defendant fraudulently obtained title to the suit property by causing a separate file to be opened at the Central Lands Registry in Nairobi and fraudulently placing forged documents thereon, counsel submitted that there was no evidence offered to prove that there was a separate file at the Central Land Registry; that there is no evidence at all to show that the documents presented by the Defendant were not authentic and, that if this is a case of double allocation, the Plaintiff should have sued for compensation and not for cancellation of the title in favour of the second allottee.
29. According to counsel, whereas the letter of allotment dated 5<sup>th</sup>, January 1999 was issued in favour of Nyagoto Investments and whereas the Defendant's full name is Nyagoto Investments Limited, the Plaintiffs' own documents show that Nyagoto Investment started as a business name registered as BN-260802 on 12<sup>th</sup>, March 1997 and ceased operating as a business by a notice filed on 27<sup>th</sup>, July 1997.
30. It was submitted by the Defendant's counsel that the documents exhibited by the Plaintiffs shows that the same was converted into a limited liability company, registration number C.77673 on 21<sup>st</sup>, August 1997 and that consequently, as at 5<sup>th</sup>, January 1999 when the Defendant's letter of allotment was issued in the name of Nyagoto Investments, there was only one entity bearing that name, being the limited liability company whose full name was Nyagoto Investments Limited.
31. It was submitted that the letter of allotment issued to the Defendant was alive to the fact that the full names of the person to whom the Letter of Allotment was addressed may not necessarily be the name in the title document and that that is why the last paragraph of the letter provides as follows:-

**“Your full name(s) in BLOCK LETTERS should be given for the purpose of the grant which will be submitted to you later.”**

32. It was counsel's contention that other subsequent documents were in the full names of Nyagoto Investments Limited; that the Grant could not have been issued in the name of Nyagoto Investments, a business name that had been converted into a limited company and that in any event, it is not mandatory that the word "limited" must be added to the names of all companies as there are some which are exempted from bearing it in-front of their name.

33. It was submitted by counsel that the documents in support of the Plaintiff's case produced as exhibits are either forgeries or greatly tampered with; that the Plaintiffs' letter of allotment is clearly a forgery because on the top left hand side of the letter, the initial name of the addressee has been rubbed out and the name David Kasamu Musembi has been typed below it and that the Plaintiff pleaded that he made a total payment of Kshs.323,317.00 towards fulfilling the conditions set out in the letter of allotment, yet the Plaintiff's purported letter of allotment demanded for only Kshs. 45,317.00. It was submitted that in the reference number of the letter, "Ref. No. 39711/XX," the letters "XX" have been added by hand.

34. It was submitted by the Defendant's counsel that the "received stamp" bearing the date of 14 March 1994 from the Department of Lands found on the Plaintiffs' letter dated 14<sup>th</sup>, March 1994 is a forgery of the official "received stamp" of the Department of Lands because when one compares the other stamps bearing the date of 14<sup>th</sup> March 1994 on the other documents produced by the Plaintiffs, including a copy of the banker's cheque dated 28<sup>th</sup> December 1993 for Kshs.5,317.00 and the copy of the banker's cheque dated 11<sup>th</sup> March 1994 for Kshs.24,000.00, the two are different.

35. Counsel further submitted that the "received stamp" for the Department of Lands bear two stars, one at the left side and the other at the right side; that the suspect received stamp on the letter of 14<sup>th</sup>, March 1994, which is presumably the same date the copies of the two cheques were received, has two stars at the left side and one star at the right, making a total of three stars; that the two sets of "received stamps" purportedly from the Department of Lands, "record" section – one bearing three stars and the others two stars, cannot have both come from the same office and that the Plaintiffs witness was not able to explain the contradictions in the said stamps.

36. Counsel for the Defendant submitted that the offer to the Plaintiff had long lapsed for failure on the part of the Plaintiffs to make full payments; that the land became available for allocation to another person; that any payment from the year 2006 when the said plot No. 108 Athi River had been surveyed and grant issued in favour of the Defendant as L.R. No. 20507 was of no effect because the said un-surveyed plot no longer existed and that if the Plaintiffs expended these sums, in pursuit of the said plot, they can only sue the Government for a refund.

37. It was submitted that according to **Section 21** of the **Companies Act**, not all companies carry the word 'limited' alongside their names; that the mere omission of the word 'Limited' from Nyagoto Investments in the letter of allotment dated 5<sup>th</sup>, January 1999, does not make the Defendant less of a limited liability company and that pursuant to **section 23 (1)** of the **Registration of Titles Act**, a Certificate of Title is to be taken as conclusive evidence of proprietorship and the same cannot be subject to challenge, except on the ground of fraud or misrepresentation to which the proprietor is proved to be a party.

38. Counsel submitted that no fraud has been proved against the Defendant in the acquisition of the suit property; that in any case, under Section 24 of the Registration of Titles Act, a person deprived of an interest in land, in favour of another person, can only sue for damages and not for cancellation of the title ensuing therefrom and that the Plaintiff's claim for cancellation of the Defendant's title is, to that extent, misconceived and an abuse of the process of court.

39. Reliance was placed on the case of **Dr. Joseph Arap Ng'ok vs Justice Moiwo Ole Keiwua & Others: Civil Application Number Nairobi 60 of 1997**, where the Court of Appeal, while deciding between competing interest in respect to two letters of allotment, held that title to landed property can only come into existence after the issuance of the Letter of Allotment, meeting the conditions stated therein, and actual issuance thereafter of title documents pursuant to the provisions under which the property is held.

40. Counsel submitted that by the time the offer contained in the letter of allotment in favour of the Plaintiff lapsed, the Plaintiff had not obtained any interest in the land. Reliance was placed on the case of **Joseph Arap Ng'ok (supra)** which was restated in the case of **Wreck Motor Enterprises vs Commissioner of Lands & 3 others [1997] eKLR** in which the Court of Appeal held as follows:-

***"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." See DR. Joseph N.K. Arap Ng'ok VS. Justice Ole Keiwua & 4 Others Civil Application NO. NAI.60 OF 1997(unreported.)***

41. Counsel submitted that the Plaintiffs' letter of allotment has too many questions and errors which clearly show that the Plaintiff is not a genuine allottee and that even if the Plaintiff was to be declared a genuine allottee, the offer in the allotment letter lapsed when the Plaintiff failed to make full payment within 30 days from the date of the letter.

42. In conclusion, the Defendant's counsel submitted that the Plaintiff had not proved his case on a balance of probability and urged that the suit be dismissed with costs. Counsel submitted that the Defendant had proved that he is the proper, genuine and legal registered proprietor of the suit land which is in its possession and occupation. Counsel urged the Plaintiff to be restrained from trespassing onto the suit land as sought in the Counter claim.

#### **Analysis & determination**

43. Having carefully considered the pleadings, the evidence and submissions by the parties herein, the following issues arise for determination:

i. Whether there is a valid Defence and counter claim on record.

ii. Who is entitled to plot number 108 also known as LR No. 20507.

44. It has been submitted for the Plaintiffs that the Defendant has no valid Defence and counter claim on record; that the Defendant's Defence and Counter- Claim filed in Court on 3<sup>rd</sup> of September 2015 stood struck off after the Defendant failed to comply with the court's orders of 6<sup>th</sup> February 2015 and that the subsequent orders of 16<sup>th</sup> October 2017 did not save the situation as the Defendant had not sought for reinstatement of its pleadings.

45. The record shows that by way of an application, the Defendant sought for an order of the court to set aside the interlocutory judgment that had been entered in favor of the Plaintiff on 2<sup>nd</sup> September, 2010. Vide the Ruling delivered by this court on 6<sup>th</sup> of February 2015, the court directed *inter alia* that;

**a) The judgment entered on 2.9.2010 is set aside.**

**b) The defence and counterclaim are deemed properly filed but to be served within 14 days.**

**c) The Applicant to pay Respondent KShs.10,000/- throw away costs within 14 days and in default the defence and counterclaim to be struck out.**

**d) Matter be fixed within 30 days for directions after parties comply.**

46. The Defendant did not comply with the timelines stipulated in the said Ruling. On 11<sup>th</sup> May, 2015, the Defendant filed an application seeking to enlarge time within which to comply with the aforesaid orders. When the matter came up in court on 16<sup>th</sup> October 2017, the parties by consent had the applications dated 6<sup>th</sup> May 2017 and 11<sup>th</sup> May 2015 allowed. The Application of 6<sup>th</sup> May 2017 being the Plaintiff's Application for revival of the suit and substitution of the Plaintiff.

47. It is trite that a consent order has contractual effect and cannot be discharged unless under particular circumstances. In discussing this principle, the Court of Appeal in *East African Portland Cement Company Limited vs Superior Homes Limited [2017] eKLR* cited with approval the case of *Brooke Bond Liebig Ltd case [1975] EA 266*, where the Court stated that:

***"a consent order cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."***

48. Having allowed the Application dated 11<sup>th</sup> May 2015 by consent, the Plaintiffs cannot purport to now challenge the same on the grounds that *"in the absence of a prayer for reinstatement of the struck off counterclaim, the only thing the Defendant could do was on the payment of throw away costs."* The prayer that the Plaintiff conceded to was for the enlargement of time "within which the defendant is to comply with the orders given by the court on the 6<sup>th</sup> February, 2015," which included filing the Defence and Counter claim.

49. Having filed and served its Defence and Counter claim in accordance with the consent order, this court finds that the Defendant's Defence and Counter-Claim are properly on record.

50. It is the Plaintiffs' case that vide a letter of allotment dated 3<sup>rd</sup> November 1993 reference number 39711/xx, the deceased (the original Plaintiff) was offered the property known as L.R No 108 measuring 1.0HA; that the allotment letter indicated that he was to accept the offer within 30 days by paying the sum of Kshs 45,317 and that the deceased accepted the offer vide the letter dated 28<sup>th</sup> December 1993 and paid Kshs 5,317 as part payment, which payment was received.

51. According to the Plaintiffs, the deceased wrote to the Commissioner of Lands forwarding two cheques for the sums of Kshs 3000 and Kshs 24,000 being further payments; that he was issued with a receipt for the said amount on 6<sup>th</sup> April 1994 and that he was issued with two letters dated 14<sup>th</sup> March 1994 acknowledging receipt of the sums of Kshs 3000 and Kshs 24,000/= respectively.

52. It is the Plaintiffs' case that despite having accepted the offer and paid for the plot, there was delay in the issuance of the title document leading him to seek for the assistance of a private surveyor, one Mr. Wafula, who later found out that the plot had been allocated to someone else in the year 1999.

53. The perusal of the documents produced by PW1 shows that indeed a letter of allotment was issued in favour of the late David Kasamu Musembi (the Plaintiffs) for plot number 108, Athi River, on 3<sup>rd</sup> December, 1993. According to clause 2 of the letter of allotment, the Plaintiff was required to accept the "offer" by paying to the government a total of Kshs. 45, 317 within 30 days. PW1 admitted in evidence that the entire amount of Kshs. 45,317 was not paid within the said 30 days, including the initial deposit of 5,317 whose receipt shows that the same was paid on 21<sup>st</sup> January, 1994.

54. The evidence before this court shows that after the payment of Kshs. 5,317 to the government by the Plaintiffs (deceased) on 21<sup>st</sup> January, 1994, the Plaintiffs made a further payment of Kshs. 27,000 on 6<sup>th</sup> April, 1994 vide two bankers cheques. The total amount that the Plaintiff had made to the government as at 6<sup>th</sup> April, 1994 was Kshs. 32,317 against the required amount of Kshs. 45,317.

55. The other receipts produced by PW1 shows that the Plaintiffs (the deceased) paid Kshs. 55,000 for the land rent for plot 108 on 24<sup>th</sup> January, 2006 and Kshs. 35,000 on 14<sup>th</sup> March, 2006. The Plaintiff made further payments for land rent on 28<sup>th</sup> March, 2006; 25<sup>th</sup> April,

2006 and 11<sup>th</sup> December, 2006.

56. It was the evidence of PW1 that when he conducted a search at the lands registry, it revealed that a title of the suit property had been issued in the name of Nyagoto Investments Limited being L.R No 20507; that a further search at the companies' registry showed that Nyagoto Investments was a business name and that Nyagoto Investments Limited came into being later on.

57. PW1 was categorical that the deceased never surrendered the land to the government nor was it repossessed; that by the time of the purported allotment of the suit property to the Defendant in 1999, the deceased already owned the property and was waiting to be issued with the title deed; that while the deceased was waiting for the issuance of the title deed in his name, he had fenced off the land and that the deceased discovered about the issuance of the title to the Defendant in 2010.

58. It is the Plaintiffs' case that the letter of allotment dated 5<sup>th</sup> January 1999 was issued to a non-existent business name and is therefore null and void. In support of this contention, the Plaintiff has produced in evidence letters from the Registrar of Companies which shows that Nyagoto Investments, a business name, was registered on the 12<sup>th</sup> of March 1997 under registration number BN-260802 and that the said business name ceased operations vide a notice filed on the 27<sup>th</sup> of July 1997, the same having been converted into a limited liability company on 21<sup>st</sup> August 1997.

59. The Defendant does not dispute the above evidence on its legal status as adduced by the Plaintiffs. According to the Defendant, as at the date of the issuance of the allotment letter to the Defendant, Nyagoto Investments, as a business name, was not in existence. It is the Defendant's case that the allotment letter dated 5<sup>th</sup> January, 1999 was obviously made to the company, there being no other entity by the name Nyagoto Investments.

60. It is the Defendant's case, which I agree with, that the omission of the word "limited" in the letter of allotment dated 5<sup>th</sup> January, 1999 was a mistake which does not change the fact that the issuance of the letter of allotment was to the company that had transformed from Nyagoto Investments to Nyagoto Investments Limited in 1997.

61. The evidence adduced in this court shows that after the Commissioner of Lands issued to Nyagoto Investments the letter of allotment dated 5<sup>th</sup> January, 1999, with a rider that the sum of Kshs. 56,910 should be paid within 30 days, the said amount was paid by the Defendant on 20<sup>th</sup> June, 2002. After the payment of the said amount, the suit property was registered in favour of the Defendant as LR No. 20507 on 30<sup>th</sup> August, 2002.

62. The evidence adduced in this court shows that the Defendant is the registered proprietor of the suit property having being so registered on 30<sup>th</sup> August 2002. By dint of the provisions of **Section 107** of the **Land Registration Act, 2012**, the law applicable to the title held by the Defendant is the **Registration of Tiles Act, Cap 281**, Laws of Kenya (now repealed).

63. The repealed **Section 23 (1)** of the **Registration of Titles Act (RTA)** and the new **Section 26 (1)** of the **Land Registration Act, No. 3** of 2012 embody the doctrine of indefeasibility of title as envisaged under the Torrens System of registration. **Section 23 (1)** of the Registration of Titles Act provides as follows:

*"23 (1) 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 of 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 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."*

64. **Section 26** of the **Land Registration Act, 2012**, the successor of the Registration of Titles Act, has provisions similar to **section 23** of the **Registration of Titles Act**. **Section 26 (1)** of the **Land Registration Act 2012** provides as follows:

*"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; (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."*

65. From the foregoing it is clear that pursuant to the provisions of **Section 23 (1)** of the **RTA** (repealed), a title to land can only be challenged if obtained by fraud or misrepresentation to which the person is proved to be a party.

66. Although the Plaintiffs have alleged that the title held by the Defendant was obtained by way of fraud, the particulars of which include: causing a separate file to be opened on the suit property and to be placed thereon un-authentic documents; causing the suit property to be secretly surveyed and registered in the Defendant's name and; secretly obtaining title documents to the property, the evidence to prove the said particulars of fraud was not adduced by the Plaintiffs.

67. Indeed, it is trite that under **section 107** of the **Evidence Act**, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. As has been held in numerous decisions of this court and the Court of Appeal, the allegations of fraud must be strictly proved. In **R.G. Patel versus Lalji Makanji (1957) EA 314**, the Court of Appeal stated as follows:

***“Allegations 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.”***

**68.** The Plaintiffs did not adduce evidence to show that a separate file was opened in respect to the suit property at the lands registry, or at all. The evidence before this court shows that by the time the Defendant was issued with a letter of allotment for plot number 108 on 5<sup>th</sup> January, 1999, the Plaintiff had not paid the requisite amount of Kshs. 45,317, or demanded in the letter of offer.

**69.** The Plaintiffs having not honoured the terms of the letter of allotment of 3<sup>rd</sup> December, 1993 of paying Kshs. 45, 317 as at 5<sup>th</sup> January, 1999, the Commissioner of Lands was at liberty to re allocate the said land, which he did, to the Defendant. Indeed, any payment that was made by the Plaintiffs from the year 2006 when the said plot No. 108 Athi River had been surveyed and a grant issued in favour of the Defendant as L.R. No. 20507 in the year 2002 was of no consequence.

**70.** Having found that the Defendant was issued with a letter of allotment upon the Plaintiffs’ failure to comply with the terms of the letter of allotment that was issued to him, and the Defendant having been issued with a grant on 30<sup>th</sup> August, 2002, it is the finding of this court that the Plaintiffs have not proved their case on a balance of probabilities.

**71.** On the other hand, the Defendant has proved that it was allocated the suit property regularly and holds a valid grant which ought to be protected by this court pursuant to the provisions of **Article 40 (1)** of the Constitution.

**72.** For those reasons, this court decrees as follows:

**a) The Plaintiffs’ suit is dismissed with costs.**

**b) A permanent injunction be and is hereby issued restraining the Plaintiffs or their agents, employees or anyone claiming under them from trespassing on land known as LR No. 20507.**

**c) The Plaintiffs to pay the costs of the suit and the counter claim.**

**Dated, signed and delivered virtually in Machakos this 20<sup>th</sup> day of January, 2022.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

Ms. Wanjiku for Mr. Nzei for the Plaintiffs

Mr. Masore for the Defendant