



Nambiro & another v Mungoni & 3 others (Environment & Land Case 314 of 2014) [2025] KEELC 4084 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4084 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 314 OF 2014**

DO OHUNGO, J

MAY 29, 2025

BETWEEN

PATRICK MUBATSI NAMBIRO 1ST PLAINTIFF

ANNE NAMBIRO 2ND PLAINTIFF

AND

SOLOMON WATTWA MUNGONI 1ST DEFENDANT

MUNICIPAL COUNCIL OF MUMIAS 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced in the High Court on 4th April 2011, when the First Plaintiff and Peter Nambiro Mubatsi as Second Plaintiff filed Plaintiff dated 21st March 2011. Later, the matter was transferred to this Court. Peter Nambiro Mubatsi (hereinafter ‘the deceased’) passed away on 13th May 2020 and was substituted by his daughter Anne Nambiro, pursuant to an order made on 21st September 2022. Earlier, Anne Nambiro had obtained Letters of Administration Ad Litem in respect of the deceased’s estate on 14th March 2022.
2. The initial Plaintiff was replaced with Amended Plaintiff amended on 26th September 2022. The Plaintiffs averred in the Amended Plaintiff that the deceased was allocated a plot by the then South Wangwa Development Council which later became the Second Defendant. That subsequently in 1994, the deceased allowed the First Plaintiff who was his son to apply for the plot which had been developed and had become Mumias Plot No. 68 (the suit property).
3. The Plaintiffs further averred that the First Plaintiff was issued with a letter of allotment in respect of the suit property in 1995, accepted the offer and fulfilled all the conditions therein. That the Plaintiffs



had peaceful occupation and use of the suit property from 1964 to the date of filing of the suit. The Plaintiffs also averred that an employee of the Second Defendant allocated himself Plot No 69 in the same area and immediately transferred it to the First Defendant. That in 2003, the Defendants fraudulently issued a certificate of lease in respect of Plot No. 69 which became Block 1/96 and that the First Defendant trespassed into a portion of the suit property in 2004 and erected a wall leading to a number of cases which were either dismissed for non-attendance, withdrawn or struck out.

4. The Plaintiffs therefore sought judgment against the Defendants jointly and severally for:
 - a. A permanent injunction against the 1st Defendant or his agents restraining them from interfering with the plaintiffs use, occupation and quite (sic) enjoyment of Mumias town Plot No. 68.
 - b. An order directing the 2nd, 3rd and 4th defendants, to Survey Mumias town Plot No. 68 and register and issue of lease and certificate of lease in favour of the Plaintiff.
 - c. Cancellation of registration and title of the 1st Defendant in respect of Mumias Town B 1/96 in event it is related to Plot No. 68 and the developments thereon.
 - d. Costs.
 - e. Any other reliefs just.
5. The First Defendant filed Statement of Defence dated 13th May 2011 in which he denied the allegations of trespass and fraud and averred that his plot was No. 69 also known as title number Mumias Municipality/Block 1/96 which he acquired for value. He averred that he was occupying Plot No. 69 and not the suit property. He therefore prayed that the Plaintiffs' suit be dismissed with costs.
6. The Second Defendant filed Statement of Defence dated 17th May 2011 in which it denied the Plaintiffs' averments and stated that it would seek striking out of the suit on grounds that it was res judicata.
7. On their part, the Third and Fourth Defendants filed Statement of Defence dated 18th September 2018. They denied the Plaintiffs' averments and urged the Court to dismiss the suit with costs.
8. The First Plaintiff (PW1) adopted his witness statement. He stated that the First Defendant herein trespassed on the suit property. That the deceased was allocated the suit property in the year 1962 and constructed on it the same year. That the suit property has never been surveyed and that an allotment letter was issued to him in 1994. He further stated that he accepted the terms in the allotment letter and paid the requisite fees. The First Plaintiff also stated that no lease has been issued to him in respect of the suit property and that the Second Defendant was supposed to do the survey.
9. Damiano Milinue Lukalamu (PW2), an Assistant Director Survey in Kakamega, produced a report dated 20th February 2020 which was prepared by Mathew Rionokal who was County Surveyor Kakamega County and who was later transferred to survey headquarters. He stated that the report noted that there was no Part Development Plan (PDP) for the suit property and that it was therefore not possible for a lease to be registered in respect of the suit property. He added that a sketch cannot be used in place of an approved PDP and that he could not tell the exact location of the suit property without a PDP. He further stated that the file in respect of Plot No. 69 was with the Director of Survey and not at the County level.
10. Kevin Mwenda Marangu (PW3) stated that he was the County Physical Planner Kakamega County. He produced a report which was prepared by Stephen S Chune who was the Director of Physical Planning of the County Government of Kakamega. He stated that there was no physical plan for that



specific area of the suit property and that the power to allocate plots lay with the Commissioner of Lands. He further stated that he did not know whether the area was surveyed and that he did not know if plot No. 69 had a lease.

11. Stanley Omucheni Matende (PW4) stated that he was a Licensed Land Surveyor and that upon instructions by the Plaintiffs, he prepared a survey report dated 21st January 2022. He produced the report and stated that neither the Defendants nor neighbours were present when he went to the site to prepare the report and that no approved survey was done in respect of Plot No. 69.
12. Anne Nambiro (PW5) stated that she was born on 18th October 1967, and that the deceased was her father while the First Plaintiff is her brother. She adopted her witness statement dated 9th March 2022 where she stated that the deceased was allocated the suit property in 1962 and developed on it a permanent 6 roomed commercial building. That the deceased started paying plot rent, rates, business licences and electricity from the year 1968 under the reference Plot 1. That in 1992, Mumias Town Council instructed allottees with permanent commercial premises to reapply for the plots leading to changes in plot indexing in 1995.
13. PW5 further stated that the deceased asked the First Plaintiff to apply for the area occupied by the commercial building he had erected, and the plot number changed from Plot 1 to Plot 68 under the new index. That the First Plaintiff was issued with an allotment letter, and he paid the sum stated therein.
14. Under cross-examination and re-examination, PW5 stated that the suit property was not surveyed when letter of allotment was issued since there was no PDP and the Plaintiffs were still waiting for a survey which they paid for in 1995. That the plot number was changed on the basis of a sketch map and that no certificate of lease had been issued to the First Plaintiff. She further stated that a survey was carried out in respect of Plot No. 69 and the First Defendant was issued with a Certificate of Lease. She also stated that Plot No. 69 and the suit property are different and that they only realised that Plot No. 69 had been surveyed when they found beacons on the veranda of the building which the deceased had constructed. That they do not have a certificate of lease in respect of the suit property because there is no approved PDP and that the deceased and the First Plaintiff attended Mumias Physical Planning Liaison Committee but did not agree with resolution of the said committee.
15. Plaintiffs' case was thereafter closed.
16. Solomon Watitwa Mungoni (the First Defendant) testified as the sole defence witness. He adopted his witness statement which he filed on 25th February 2020 and produced copies of the documents listed as item numbers 1 to 12 in his list of documents dated 18th May 2011, copies of the documents listed as item numbers 1 to 3 in his further list of documents dated 5th March 2020 and copies of the documents listed as item numbers 5 to 15 in his further list of documents dated 10th June 2021, as his exhibits.
17. He stated in the statement that he purchased Plot No. 69 from Ali George Wangara in May 2002 at a consideration of KShs 400,000. That he conducted a survey and then forwarded his documents to Survey of Kenya after which he was issued with a lease on 30th January 2003 followed by a certificate of lease. That during the survey, it was noticed that the deceased's building was erroneously erected since a portion of it was on Plot No. 69 and a road reserve. That when he started developing his plot, the deceased lodged a claim against him before the Mumias Municipal Liaison Committee and that the committee resolved that he goes on with development of part of Plot No. 69 since he had ownership documents. He further stated that he had confined all his activities within Plot No. 69 and had not encroached on the suit property.



18. Under cross-examination and re-examination, the First Defendant stated that when he purchased Plot No. 69 in 2002, he found an old building standing on a portion of it and that he did not inform the Plaintiffs when he conducted his survey. He added that he did not have a PDP for Plot No. 69 and that as of the date of his testimony, he had an ongoing construction on the plot which was 50 per cent complete. In conclusion, he stated that Ali George Wangara had since passed away.
19. The First Defendant's case was then closed. After some adjournments, the Second to Fourth Defendants' cases were closed without any evidence being tendered.
20. Directions were thereafter given that parties file and exchange written submissions. The Plaintiffs filed submissions dated 25th March 2024, the First Defendant filed submissions dated 14th February 2024 and that the Second Defendant filed submissions dated 5th September 2024. The Third and Fourth Defendants did not file any submissions.
21. I have considered the pleadings, evidence, and submissions. The issues that arise for determination are whether fraud has been established, whether the First Defendant has a valid title and whether the reliefs sought should issue.
22. From the material on record, there is no dispute that the two parcels in contention trace their roots to public land or as it was previously referred to, government land. Both the First Plaintiff and the First Defendant contend that letters of allotment were issued to them or their predecessors. In particular, the First Plaintiff has placed reliance on letter of allotment dated 15th June 1995 under Ref. No. 423/V/118 in respect of "Uns. Commercial Plot 68 – Mumias" while the First Defendant has relied on letter of allotment dated 15th June 1995 under Ref. No. 423/V in respect of "Uns. Commercial Plot 69 – Mumias" issued to Ali George Wangara.
23. It is further not in dispute that the First Defendant purchased the property in respect of which the letter of allotment was issued to Ali George Wangara and that the said property became Mumias Municipality Block I/96 in respect of which a lease for the term of 99 years from 1st June 1995 was issued to him on 20th December 2002 and registered on 30th January 2003 followed by issuance of a Certificate of Lease dated 30th January 2003.
24. A registered proprietor of land is entitled to rights and privileges clearly spelt out in the law. Foremost, Article 40 of the *Constitution* guarantees protection of his right to property. Additionally, Section 24 of the *Land Registration Act* makes specific provisions as follows:
Subject to this Act—
 - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
25. Section 26 of the *Land Registration Act* obligates the court to accept the certificate of title issued by the Registrar as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title is not to be challenged except on the grounds specified in the provisos under Section 26 (1) (a) or (b). Those provisos state that the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it



is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. Thus, despite the fortified protection, title to property which is found to have been unlawfully acquired is open to impeachment.

26. The First Defendant's title to land parcel number Mumias Municipality Block I/96 is in the nature of a leasehold interest for a term of 99 years from 1st June 1995. The Plaintiffs have attacked the First Defendant's title on the basis of allegations of fraud. The law relating to the manner of pleading and proving fraud in civil cases is settled.
27. It bears repeating that fraud is a serious allegation and that the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
28. The Court of Appeal stated in *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* (supra):

The standard or burden of proof where fraud is alleged in civil matters has been held in decided cases to be of higher than the ordinary standard of balance of probabilities... Indeed, allegations of fraud are of serious nature that may carry with them penal consequences that may further infringe on a person's right to liberty hence the insistence that fraud ought to be specifically pleaded, with particulars thereof, and proved. It would be foolhardy for the appellant to dismiss allegations carrying such far reaching consequences as merely procedural. In *Emfil Ltd vs. Registrar of Titles Mombasa* (supra), this Court pronounced itself as follows on the issue:-

Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence.”

29. The Plaintiffs particularised their allegations of fraud against the First Defendant to include allocation of a non-existent parcel on the ground, issuance of a leasehold without meeting preconditions and legal requirements, and issuance of a leasehold title before survey and in the absence of approved plans.
30. There is no dispute that the First Defendant's parcel number Mumias Municipality Block I/96 and the suit property overlap on the ground. The First Defendant testified that when he purchased Plot No. 69 in 2002, he found an old building standing on a portion of it. The Plaintiffs contend that the building was constructed by the deceased in 1968.
31. As noted earlier, both the First Plaintiff and the First Defendant base their respective claims on letters of allotment dated 15th June 1995. There is thus no dispute that the land in contention was government land before the parties came into the picture. It has not been suggested by any of the parties herein, who include the Commissioner of Lands and the Attorney General, that the land in contention was alienated government land. Assuming therefore that it was unalienated government land, the procedure for its allocation required to start with planning through a PDP followed by surveying. At the time the letters of allotment were issued, the Government Lands Act (repealed) was in force.



32. Section 9 of the Government Lands Act (repealed) gave the Commissioner of Lands power of disposal of land within townships by providing as follows:

The Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner.

33. The Supreme Court discussed the procedure for the allocation of unalienated government land in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) where the Court stated:

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 allottees.

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.

34. There is no dispute that no PDP was prepared or approved prior to issuance of the letters of allotment and ultimate issuance of the First Defendant's title. The Plaintiffs, the First Defendant and even PW2 (Assistant Director Survey Kakamega County) and PW3 (County Physical Planner Kakamega County) all testified to that effect. In those circumstances, the First Defendant could not lawfully obtain title in respect of unalienated government land in the absence of a PDP. Any valid survey could only follow after issuance of an approved PDP.



35. It is not surprising that the First Defendant claims to have obtained title in respect of a portion where a building belonging to the Plaintiffs already stood. The failure to ensure proper planning through preparation of an approved PDP is largely responsible for the present scenario where two parties lay claim to the same parcel. I am satisfied that the Plaintiffs have proven the particulars of fraud. I am also persuaded that the First Defendant was party to the fraud since he processed the letter of allotment up to the point of issuance of title in his favour. To the extent that the First Defendant's title to parcel number Mumias Municipality Block I/96 was obtained through fraud and without following the procedure then applicable, it is an invalid title.
36. Even as the First Defendant's title is invalid for the reasons stated above, the First Plaintiff's letter of allotment does not give him any better title to the suit property to the extent that no PDP was issued in respect thereof. Besides, a letter of allotment is not title to land. The allottee has to follow it up, comply with all the conditions of the offer as well as the procedure for obtaining title to public land before he gets a valid title document. See *Wreck Motor Enterprises v Commissioner of Lands & 3 others* [1997] eKLR.
37. The Supreme Court affirmed that position in *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) where it stated:
- 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 Moiyo 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”
38. More recently, in *Sehmi & another v Tarabana Company Limited & 5 others* (Petition E033 of 2023) [2025] KESC 21 (KLR) (11 April 2025) (Judgment), the Supreme Court restated the position that an allotment that is neither legal nor regular cannot create a valid title capable of being passed to a purchaser and that the courts cannot close their eyes to irregularities attendant to an allocation of public land.
39. Consequently, the land comprised in Mumias Plot No. 68 (the suit property) and Mumias Plot No. 69 or parcel number Mumias Municipality Block I/96 remains public land until a valid procedure for alienation is followed. In those circumstances, a permanent injunction cannot issue as is sought by the Plaintiff. For the same reasons, the Court cannot issue an order directing the Second to Fourth Defendants to survey the suit property and issue a title to the First Plaintiff as that would amount to decreeing away public land without following procedure. Any of the parties who is interested in acquiring the land comprised in Mumias Plot No. 68 and Mumias Plot No. 69 or parcel number Mumias Municipality Block I/96 will have follow the appropriate procedure if and when the Government lawfully disposes of the land.
40. In view of the foregoing discourse, the Plaintiffs' case succeeds partially. The First Defendant's title in respect of the parcel of land known as Mumias Municipality Block I/96 is hereby cancelled. Considering the circumstances of the dispute, I order that each party shall bear own costs.



**DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS
29TH DAY OF MAY 2025.**

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Mamati holding brief for Mr Fwaya for the Plaintiffs

No appearance for the Defendants

Court Assistant: B Kerubo

