



REPUBLIC OF KENYA



**Kitur v Dodhia & 4 others (Environment & Land Case 65 of 2013)
[2025] KEELC 416 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 416 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 65 OF 2013**

JM ONYANGO, J

FEBRUARY 6, 2025

BETWEEN

CHRISTOPHER KIPKWAMBOK KITUR PLAINTIFF

AND

VIPUL RATILAL DODHIA 1ST DEFENDANT

DIPAKBEN VIPUL DODHIA 2ND DEFENDANT

THE NATIONAL LAND COMMISSION 3RD DEFENDANT

THE HON. ATTORNEY GENERAL 4TH DEFENDANT

SEDYLENE BEN ODARI 5TH DEFENDANT

JUDGMENT

1. By an Amended Amended Plaintiff dated 3rd December, 2015 the Plaintiff filed suit against the Defendants seeking the following orders:-
 - a. A declaration that the title documents purported to be registered and in possession of the 1st and 2nd Defendants were obtained through fraudulent means and are therefore fictitious, null and void.
 - b. A declaration that the letter of allotment reference no. 31710/XXXXIX dated the 2nd of January 1998 that was issued to Sedylene Ben Odari be and is null and void.
 - c. An order directing the 3rd Defendant to revoke and/or cancel the title documents registered, issued and in possession of the 1st and 2nd Defendants.
 - d. Permanent injunction be issued against the 1st, 2nd and 3rd Defendants, themselves or anybody acting on their behalf from interfering, subdividing, alienating, transferring, leasing or selling the said property amongst themselves or any other third party.



- e. Any other relief deemed necessary.
 - f. Costs of this suit.
2. It is the Plaintiff's case that he acquired land from the County Council of Wareng vide allotment letter reference no. D4/DPAC/Vol.11/30 dated 9th June, 1995. He later noticed suspicious activities on his said land and conducted a search. It is then that he discovered that the land had fraudulently been registered in the names of the 1st and 2nd Defendant. The Plaintiff averred that the issuance of a subsequent letter of allotment by the 3rd Defendant to the 5th Defendant, who then fraudulently sold it to the 1st and 2nd Defendant was fraudulent. He alleges that the land was then fraudulently and without basis registered as L.R. No. ELDORET MUNICIPALITY BLOCK 2/293 (the suit property herein) in the names of the 1st and 2nd Defendant.
 3. The Plaintiff averred that the 3rd and 4th Defendant had no capacity to issue an allotment letter to the 5th Defendant as the land was only available for alienation by the County Council of Wareng. He also faulted the 3rd and 4th Defendant for issuing a certificate of lease to the 1st and 2nd Defendants without any right, authority or basis, to the Plaintiff's detriment occasioning him loss and damage. The Plaintiff listed the particulars of the alleged fraud on the part of the Defendants, and accused them of encroachment over the suit property. He added that any efforts to have the Defendants leave or abstain from their adverse actions have borne no fruits, necessitating this suit.
 4. The 1st and 2nd Defendants filed an Amended Amended Statement of Defence dated 11th March, 2016. They denied the contents of the Plaint and more particularly denied the alleged encroachment into the suit property. They averred that they are innocent purchasers for value without notice of any defect in the title. They averred that they legally purchased the suit land on 17th August, 2012 from the 5th Defendant, who was the registered lessee/proprietor. They alleged that after purchase, the suit property was registered in their names and a certificate of lease issued. That the Plaintiff has no proprietary interest over the suit property, thus the claim for loss and damage as well as the prayers sought in the Plaint are unobtainable and he is not entitled to them. They denied the allegations of fraud and the particulars thereof set out in the Plaint, and prayed that the Plaintiff's suit be dismissed with costs.
 5. In response, the Plaintiff filed what he titled a "Reply to 1st and 2nd Defendants Defence and Counterclaim", although I must point out that I have perused the file and have not found any counterclaim lodged by the 1st and 2nd Defendants. In their reply, the Plaintiff joined issue with the 1st and 2nd Defendants save where the Defence contained admissions. He also denied the contents of their Defence in toto save for admissions, and reiterated the averments in his Plaint. The Plaintiff averred that the 1st and 2nd Defendants' Defence is a sham as it amounts to mere denials, and that it did not disclose any deniable issues. The Plaintiff averred that he is deserving of the orders sought in his Plaint. He prayed that the Defendants' Defence be struck out and that judgment be entered in his favour.
 6. The Attorney General entered appearance for the 3rd and the 4th Defendants but they did not file any Defence. The 5th Defendants neither entered appearance nor filed a defence.

The Evidence

7. Hearing of the case commenced on 16th November, 2018 before Justice Ombwayo. The Plaintiff testified as PW1, and he adopted his witness statement dated 8th June, 2016 as his evidence-in-chief. He testified that the suit land is registered by Wareng County Council. He produced a certified copy of the title as PEX1 and a copy of the green card as PEX2. He also produced an allotment letter dated 9/6/1995 (PEX3), stamp duty receipt dated 30/10/1995 (PEX4-a), a consent letter (PEX5), a bundle of documents for subdivision (PEX6), the registry index map (PEX7), a letter dated 15/10/2012



- (PEX8), a letter for rectification of names dated 23/9/2013 (PEX9) and a search relating to the suit property (PEX10). In addition to these documents, the Plaintiff also produced receipts for allotment (PEX11) and a lease from the Municipal Council for Wareng County (PEX12).
8. PW1 also brought receipts for rates payment showing that he was still paying rates for the suit property, and he produced them as PEX13, alongside a statement for rates (PEX14). He had in his possession a bundle of letters relating to the leases and he produced them as PEX15 and a letter dated 23/1/2013 as PEX16. The Plaintiff produced a letter from the firm of M/s Gicheru & Co Advocate to the National Land Commission dated 3/12/2014 and the reply thereto dated 5/12/2014 (PEX17a&b). PW1 testified that the 5th Defendant swore an affidavit to the effect that he has no interest in the suit land. The said affidavit was marked as PMFI18. The Plaintiff also produced a letter of allotment (PEXb19). He prayed for judgment, cancellation of the 1st and 2nd Defendants' title and costs.
 9. PW1 was recalled on 17th March, 2022 to produce the Affidavit dated 25th July, 2017 by the 5th Defendant (PEX21) and a letter dated 20th January, 2022 (PEX22). He also produced the letter of allotment dated 2nd January, 1998 issued to the 5th Defendant and a copy of his identity card.
 10. PW1 was cross examined by Mr. Kuria, he testified that the land belonged to Wareng County Council. He was given an allotment letter, which he accepted, although he admitted that he had not produced an acceptance letter. PW1 testified that he signed a lease with Wareng County Council, which is not dated but the same was registered. He testified that he paid and he has receipts for the said payments. He testified that he did not know what happened but somebody took his title. He testified that the first entry on the green card is Wareng County Council and entry number 3 is Francis Talai Tobino. He conceded that his name was not on the green card and he was also not aware if the 5th Defendant's name appeared thereon.
 11. He was re-examined and he reiterated that he accepted the letter of allotment and paid KShs. 10,375/- for registration. He clarified that the first registered owner of the land was Wareng County Council in 1979.
 12. The Plaintiff's second witness was Eric Baliaat (PW2), the former clerk of Wareng County Council until 2006. PW2 adopted his witness statement recorded on 8th June, 2015. PW2 testified that the Council allocated its land through its Plot Allocations Committee to successful applicants. It then issued letters of allotment stating the conditions to be complied with. He testified that Block 2/112/1 was a lease from the Eldoret Municipal Council to Wareng County Council. It was later subdivided and the Plaintiff herein was allocated plot no. 2/112/6, which was later registered as Eldoret Municipality Block 2/293 as per the minutes produced as PEXb6. The Plaintiff was then issued with the letter of allotment dated 9th June, 1995 signed by PW2. The Council, through its then Advocates M/s Nyaundi Tuiyot & Co. prepared a lease for the Plaintiff. PW2 testified that the plot was regularly allocated to the Plaintiff.
 13. During cross-examination, PW2 testified that he had seen the lease from the Eldoret Municipal Council giving the land to Wareng County Council, but had not brought it to court. He acknowledged that all land falling in block 2 in Eldoret are leasehold with the government of Kenya as the Lessee. He confirmed that the plot formerly known as Block 2/112/6 is what became Block 2/293 that was allocated to the Plaintiff. PW2 testified that he also served as the secretary to the Plot Allocations Committee and Chief Executive of the Council. He did not however have minutes authorising him to sign the letter of allotment. He did not know of the suit land being allocated to somebody else other than the Plaintiff or that a lease was issued. He conceded that the lease (PEX12) was not dated and he did not have the original thereto.



14. PW2 explained that the Lease was from Eldoret Municipal Council to Wareng County Council, after which it would be transferred from the Wareng County Council to the Plaintiff. He conceded that having already got a lease to the mother parcel, the leases from the sub-division should have come from Wareng County Council. He however stated that there is no transfer signed by Wareng County Council to the Plaintiff and that the lease is neither certified nor registered. He denied that Wareng County Council did not have any interest in the land due to lack of registration of the lease. PW2 told the court that he was not aware of the letter of allotment or lease issued to the 5th Defendant by the Commissioner of Lands. He further testified that the Land Registrar was not involved in plot allocation, but only got involved after the documents were presented to the Lands office for payment and registration. PW2 clarified that the government of Kenya had no interest over Block 2/211/1 and that the Commissioner of Lands had no power to allocate the parcel of land.
15. The Plaintiff then called Paul Kipketer who testified on oath as PW3 and adopted his witness statement dated 5th June, 2015 as his evidence-in-chief. He testified that he was the Chairman of the Town Planning Committee in Wareng County Council. Their duties included processing allocation of plots. He testified that people would apply for allocation of plots, and confirmed that the Plaintiff was allocated plot no. 293 by the Plot Allocation Committee.
16. On cross-examination, PW3 testified that he knew the Plaintiff as they were both Councillors. He testified that those interested in the plots applied, but he had not brought a copy of the Plaintiff's application for the land. He explained that all the documents they signed were left at the Council office and he has no access to them. He also testified that Block 2/112/1 was subdivided and the Plaintiff was allocated Block 2/112/6, which later became Block 2/293. He told the court that Block 2/112/1 belonged to the Municipal Council of Eldoret but was given to Wareng County Council. He stated that the Land Registrar participated in their committee deliberations. PW3 was not re-examined, and after his testimony the Plaintiff closed his case.
17. Thereafter, the defence case commenced with the 1st Defendant taking the witness stand as DW1. He then adopted his witness statement dated 7th March, 2013 as his evidence-in-chief. DW1 testified that he bought the land from the 5th Defendant vide an agreement for sale dated 17/8/2012 which he produced as DEX1. He paid the agreed consideration in full and was given the original Certificate of Lease issued on 7/9/2012 in his name and that of his wife (DEX2). He also produced the rates clearance certificate in the 5th Defendant's name which he produced as DEX3(a) & (b). He testified that at the time of the transaction, the 5th Defendant had an original Certificate of Lease in his name. He produced, the said certificate of lease as DEX4.
18. DW1 confirmed that he and his wife, the 2nd Defendant, are the current registered owners of the land, and they obtained consent for the transfer in their favour. That he never transferred the land to the Plaintiff, nor did they pay him any money as he was not the owner of the land. DW1 also told the court that he and his wife had not yet taken possession of the suit property, and prayed that they be declared the owners thereof. DW1 explained that the contact person he dealt with was Mr. Mayodi, the 5th Defendant's father. He testified that after this case was filed, he was stopped from fencing the land, but after lifting the inhibition, he was now allowed to use the land.
19. DW1 was cross-examined by Mr. Odongo, and he testified that he conducted an official search before buying the land, but he had not produced the certificate of official search in court. He said that his agent visited the lands office to confirm whether the documents were in order. He further testified that neither he nor the Plaintiff is in possession of the land, however there is a tree nursery on the land and he does not know who owns it. In addition, he testified that he knew that the suit land falls under property owned by the Municipal Council of Eldoret, but that the lease he has is from the government of Kenya.



He admitted that he had no receipt to show that the documents he had produced were lodged at the Land Registry and that he had no receipt for payment of stamp duty. DW1 denied that the transfer was not properly effected. He insisted that it is the 5th Defendant who could confirm that he sold the land to them. He told the court that he called the 5th Defendant to come and testify but he refused as he told him he was being threatened.

20. On cross-examination by Mr. Mathai, he testified that at the time he bought the land he was shown a letter of allotment dated 2nd January, 1998 issued to the 5th Defendant together with a lease. He was shown PEX18, the 5th Defendant's ID and confirmed that the 5th Defendant was born on 3rd March, 1992 and was only 6 years old at the time of the allotment. He said he did not know if a minor could be issued with a letter of allotment. He was shown PEX21 and he confirmed that the 5th Defendant had deponed that he had never owned the suit land and that he had not sold it the 1st and 2nd Defendants. He reiterated that he was dealing with Laban Mayodi. DW1 was shown PEX16 which he testified was an MOU dated 7th September, 2012 between Henry Lelei and Laban Mayodi, showing that he advanced KShs. 5.5 Million to Laban Mayodi and the suit property was transferred to him as security for the loan. He testified that he was not a party to the MOU, and it was not his document. DW1 was shown PEX15 which he confirmed was a letter to the DCI stating that he was not a beneficiary of the land.
21. DW1 was re-examined, and he testified that an official search was conducted before buying the land. That he was not a party to the Affidavit sworn by the 5th Defendant or the MOU. Further, that the court had found in its ruling of 20th March, 2013 that there was no material to show the title was acquired unlawfully.
22. DW1 was interrogated by the court and testified that he was not aware of the investigations that were being conducted with regard to the suit property. He did not report the threats he received from the person who came to see him in Kitale. That when he spoke to Sedylene to come and testify in court, he informed him that his life was in danger, a matter which DW1 said did not surprise him. He explained that the reason he did not fence the land was because he met with resistance when he tried to fence it. That marked the close of the 1st and 2nd Defendants' case.
23. The 3rd Defendant called Elizabeth Nyakundi, a Land Registrar at Uasin Gishu County to testify on its behalf as DW2. She presented the parcel file for the suit property which includes a certified copy of the white card that was opened on 16th January, 2012. The first entry is a lease of 99 years commencing on 1st January, 1998 with the Government of Kenya as Lessor and Sedylene Odari as Lessee. A certificate of lease issued to him on 16th January, 2012. The second entry is a transfer to the 1st and 2nd Defendants on 7th September, 2012 with a certificate of Lease issued on the same date. The third entry is a court order inhibition while the fourth and last entry is an order lifting the said inhibition.
24. DW2 produced the white card as 3rd Defendant's DEX1; the Lease dated 28/5/2001 from the government of Kenya to the 5th Defendant as DEX2; copy of the transfer as DEX3; the letter of consent as DEX4; an assessment for stamp duty dated 11/9/2012 and deposit slip for stamp duty as DEX5(a)&(b). She also produced the Certificate of Lease in the name of 5th Defendant which was surrendered so that the transfer could be effected as DEX6. DW7 testified that she was not aware of any allocation of the suit property by the Municipal Council of Eldoret. She testified that their office is involved at the tail end of the procedure and gave a summary of the process up to issuance of the Lease. She confirmed that they have only one lease in their custody in the name of 5th Defendant.
25. DW2 was cross-examined by Mr. Mathai and she testified that a letter of allotment cannot be issued to a minor. The witness was referred to PEX17 and PEX18 and confirmed that the 5th Defendant was 6 years old at the time the letter of allotment was issued. She said that she did not know whether the



- 5th Defendant was issued with a rent clearance certificate as it was not in the parcel file. She was also shown PEX21 and she testified that the said letter from the Land Administration Officer stated that the letter of consent dated 5/9/2012 did not originate from their office. DW2 was shown DEX4, and she could not tell who issued the consent. She could not however confirm that it was a forgery, but she was clear that they were not the authors of the letter of consent. She concluded by saying that she could not confirm its authenticity.
26. On cross-examination by Mr. Songole, DW2 was shown 1st Defendant's DEX5(a) and she testified that it was a rate clearance certificate for the suit property dated 31/8/201; while DEX5(b) was a rates payment request for the suit property dated 29/8/2012 for KShs. 59,917/-.
27. When DW2 was re-examined and she clarified that the rates clearance certificate and request for payment were issued by the Municipal Council of Eldoret in the name of the 5th Defendant which tallies with the name on the white card. Upon being shown PEX17(a), she testified that the document referred to Eldoret Municipality Block 2/239, which is different from the suit property. She testified that the office of the Land Registrar was not involved in the allocation process, thus she did not know what the allotting authority took into account. She also did not know whether the allotting officer could allocate land to a minor. DW2 testified that the consent letter dated 5/9/2013 (PEX21) was issued by the Commissioner of Lands. She therefore denied the allegation that the same was not issued by the Land Administration Office, and explained that the office of the Land Administrator is under the Ministry of Lands.
28. After DW2's testimony, the 3rd and 4th Defendants closed their case. This marked the close of the hearing and court directed the parties to file their written submissions, to which they complied. The Plaintiff filed his submissions dated 3rd October, 2024, the 1st and 2nd Defendants filed their submissions dated 27th November, 2024 while the 3rd and 4th Defendants' submissions are dated 13th November, 2024.

Plaintiff's Submissions

29. Counsel for the Plaintiff argued the case on five issues. The first regards the allotting authority of the suit land. Counsel argued that from the evidence adduced, Wareng County Council was the lessor of suit land and not the Commissioner of Lands. Secondly, Counsel for the Plaintiff submitted that the Plaintiff having complied with the terms of the letter of allotment dated 9th June, 1995 his allotment became valid, and he was never notified by the Wareng County Council that it had been revoked. He relied on *Rukenya Ali Mohamed vs David Gikonyo Nambacha & Another*, Kisumu HCCA No. 9 of 2004 cited in *Lucy Njeri vs Isaac Wangonya Mwangi & Another* (2018) eKLR.
30. Regarding the letter of allotment issued to the 5th Defendant, Counsel submitted that at the time it was issued, the 5th Defendant was a minor and he did not have capacity to accept and make payments. Additionally, Counsel asserted that the Lease should have been issued by Wareng County Council and not the government of Kenya. Counsel made reference to the 5th Defendant's affidavit denying that he was allotted the suit property or that he had any claim thereto. Counsel urged that the letter of allotment issued to the 5th Defendant was therefore void ab initio and thus invalid, he relied on *Joseph N.K. Arap Ng'ok Ole Kelwua & 4 Others* (1997) eKLR.
31. As to the fraud alleged on the part of the Defendants, Counsel recounted the testimonies and evidence adduced and submitted that the instruments used to register the 5th Defendant as the owner of the suit land were the product of fraud. For this reason, Counsel argued that the subsequent transfer from the 5th Defendant to the 1st and 2nd Defendants was fraudulently obtained. Further, that the Certificate of Lease held by the 1st and 2nd Defendants was a product of fraud, hence null and void. Counsel referred



to Section 6 of the Registration of Persons Act as well as the cases of Kuria Kiarie & 2 Others vs Sammy Magera (2008) eKLR and Kinyanjui Kamau vs George Kamau (2015) eKLR.

32. It was submitted on behalf of the Plaintiff that having regard to the circumstances of the case, the title held by the 1st and 2nd Defendants was defeasible. He referred to Section 24 of the Land Registration Act, and further relied on Malankumar Shah & 2 Others vs City Council of Nairobi & Attorney General, Nairobi HCC No. 1024 of 2005, Munyua Maina vs Hiram Maina (2013) eKLR and Alice Chemutai Too vs Nickson Kipkurui Too & 2 Others (2015) eKLR. Counsel also submitted that the 5th Defendant's failure to file a defence and call witnesses meant that he did not oppose the Plaintiff's claims. He also faulted the 3rd Defendant for not calling any witness from the Commission to testify on whether they issued the letter of allotment to the 5th Defendant. On this, the Plaintiff relied on Ng'ang'a Kiongo & 3 Others vs Town Council of Kikuyu (2012) eKLR, Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others, Nbi (Milimani) HCC No. 1243 of 2001. Counsel submitted that the evidence of the Plaintiff and his witnesses was unchallenged, and he had proved his case on a balance of probability, thus the reliefs sought in his Plaintiff should be granted.

1st and 2nd Defendants' Submissions

33. It was submitted for the 1st and 2nd Defendants that the Plaintiff had not established a nexus between the suit property and Block 2/112/1. Counsel submitted that the Wareng County Council was a lessee and thus had no locus and/or capacity to allocate the land as this could only be done by the Eldoret Municipal Council. Counsel also pointed out that although the Wareng County Council and the Eldoret Municipal Council signed a lease, there was no proof that the same was registered. Counsel submitted that on the other hand, the 1st and 2nd Defendants had proved that they had purchased the suit land from the 5th Defendant and obtained the requisite consent from the Commissioner of Lands to transfer the land into their names. Counsel invited the court to consider the provisions of Section 24 and 26(1) of the Land Registration Act. He was of the opinion that the Plaintiff had not proved his interest in the land. Counsel cited the case of Justin Gatumata vs Kenya Power & Co. Ltd (2018) eKLR.
34. It was also submitted that having been lawfully registered as the owner of the suit property, the 5th Defendant was entitled to deal with the property as he desired, including selling it to the 1st and 2nd Defendants. That this was done following the right procedure and filing the necessary documents. He faulted the Plaintiff for not leading evidence in support of the alleged fraud, and argued that DW2 was an expert witness who testified to the authenticity of the 1st and 2nd Defendant's lease by producing the white card in support of her testimony. Counsel cited Section 48(1)(2) of the Evidence Act on the opinion of expert witnesses and relied on the case of Davei vs Edinburgh Magistrates (1933) SC 34 at 40. Counsel submitted that the order for cancellation of title is not tenable and urged the court to declare that the 1st and 2nd defendants are the current lawfully registered owners of the land and bar the Plaintiff's interference.

3rd and 4th Defendants' Submissions

35. On his part, Counsel for the 3rd and 4th Defendants submitted that the Plaintiff failed to prove any allegation in the Plaintiff for the following reasons:- First, that the Plaintiff did not prove that he was ever allocated the suit property. Secondly, any breach of the letter of allotment could not be visited on the 3rd and 4th Defendants who were not privy to it; Thirdly, since no lease was ever registered in the Plaintiff's favour, the land cannot be said to have been unavailable for allocation; Fourthly, Wareng County Council surrendered the Lease to Eldoret Municipality and had no capacity to allocate the sub-divisions; and finally, Block 2 parcels were zoned for municipal and central government leases, thus Wareng County Council, as a Lessee was not allowed to allocate municipal leases.



36. Counsel argued that the Commissioner of Lands was notified of the Surrender of Lease vide a letter dated 23/12/1997, paving way for allocation of the subdivisions, which the Commissioner had capacity to allocate. That the suit land only became private land and unavailable for allocation after it was allotted to the 5th Defendant. Counsel argued that the Plaintiff had also failed to offer evidence in support of his allegations of fraud, which ought to have been strictly proved to the required standard. Counsel relied on *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* (2000) eKLR and *Ndolo vs Ndolo* (2008)1 KLR (G&F) 742.
37. Counsel submitted that the issue of the age of the 5th Defendant was never pleaded but only arose during trial, thus the 3rd Defendant was denied a chance to respond to it. That in any event, at the time the Lease was prepared in favour of the 5th Defendant, he was no longer a minor and he relied on *Galehu vs Komba* (Environment and Land Appeal E003 of 2021 (2023) KEELC 16506 (KLR). He opined that the 3rd Defendant's actions cannot thus be defeated on allegations that were not pleaded. Counsel submitted that the only relief that the court could grant was to dismiss the suit against the 3rd and 4th Defendants.

Analysis and Determination

38. I have carefully and anxiously considered the pleadings, oral and documentary evidence as well as the rival submissions and the following issues arise for determination:
- i. Whether the suit property was available for allocation to the 5th Defendant;
 - ii. Whether the Certificate of Lease held by the 1st and 2nd Defendants was obtained lawfully
 - iii. Whether the 1st and 2nd Defendants are bonafide purchasers for value without notice
 - iv. Whether the Lease issued to the 1st and 2nd Defendant in respect of the suit property should be revoked and/or cancelled.

a. Whether the suit property was available for allocation to the 5th Defendant;

39. The suit property is at present registered in the name of the 1st and 2nd Defendants' names and they hold a Certificate of Lease. They claim to have acquired it lawfully after they bought the land from the 5th Defendant, and that he transferred the land to them after following the requisite process. They have asked this court to uphold the transfer from the 5th Defendant to them and declare them the legal owners of the land, and in addition, to bar the Plaintiff from interfering with their ownership.
40. Section 24 of the Land Registration Act on the interests conferred by registration provides that:-
- 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.
41. In addition, Section 26(1) provides that:-



- (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.

42. The Plaintiff has challenged the 1st and 2nd Defendants’ Lease on ground that it was acquired fraudulently. To determine whether or not the title to the suit property was obtained regularly and without fraud, it is necessary that this court examines the root of the said title. This translates to interrogating how the Lease came to be registered in the name of the 5th Defendant, which is the root of the title that is being challenged herein. In *Munyu Maina vs Hiram Gathiha Maina (2013) eKLR*, the Court of Appeal held that:-

“... We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony. We find that a trust exists in relation to the suit property.”

43. The Plaintiff’s claim is that he is the original allottee of the suit property and that he was entitled to registration as proprietor thereof. He was issued with a letter of allotment by the County Council of Wareng dated 9th June, 1995. The condition contained in this letter was that the Plaintiff was to pay a total of KShs. 20,000/- described therein as the purchase price. This amount was to be paid in two instalments, with the first instalment being a deposit of KShs. 5,000/- due on or before 31st August, 1995 and the balance on or before 30th November, 1995.

44. The Plaintiff has produced two receipts as PEX4 (a) & (b) for payment of KShs. 15,000/- and KShs. 5,000/- respectively. Although the deposit was paid on 4th September, that is 4 days after the stated date, the balance was paid on 30th October, 1995 way before the deadline of 30th November, 1995. The Plaintiff therefore complied with the condition of payment of the purchase price for the suit property as required in the letter of allotment. The plaintiff having complied with the terms contained in the letter of allotment meant that the land was no longer available for allocation to any other person. Justice L.N. Waithaka in *Lagat vs Kebut (Environment and Land Appeal E021 of 2022) [2023] KEELC 18432 (KLR)*, held that:-

“Clearly, when the deceased was unable to pay the requisite fees by that day, the offer lapsed. See *Rukaya Ali Mohamed vs David Gikonyo Nambachia & another Kisumu HCCA. 9/2004* where Warsame J held that:

‘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’.”

45. Moreover, as PW2 testified, the mother parcel was already allocated to the Eldoret Municipal Council, who in turn transferred it to the Wareng County Council. This is evidenced by PEX2 which is the green card for the mother title, Block 2/112/1, which shows that the land was leased to the Wareng County Council on 30th April, 1979. The second entry in the green card is the issuance of a Lease which was issued to Wareng County Council on 6th October, 1980. The 3rd entry on the green card is Francis Talai Tobino, however, the green card shows that this entry was made in error. The 5th entry is a “surrender of lease in exchange with new leases upon subdivision”. The new leases to be issued on subdivision were on the new subplots, one of which is the suit property herein.
46. Upon the subdivision, the County Council of Wareng allotted the suit property which was then known as Plot 2/112/6 to the Plaintiff herein. The Plaintiff’s witnesses explained that the initial leases for the sub-plots were from the Municipal Council of Eldoret to Wareng County Council. I presume this is because the mother title had been surrendered back to the Municipal Council of Eldoret. PW2 further testified that thereafter, the sub-plots would be transferred to the individual allottees, the Plaintiff herein included, by the County Council of Wareng. This kills the argument that Wareng County Council had no authority to allocate municipal leases.
47. In any event, part of the bundle produced as PEX6 is a letter dated 25th August, 1998 from E.K. Baliat, the Clerk to the Council who testified as PW2. It is addressed to the Town Clerk, Eldoret Municipal Council and it refers to “SUBDIVISION AND ALLOCATION OF PLOTS”. The letter contains names of allottees of plots subdivided from land owned by the Council. It is clear that the Municipal Council of Eldoret was well informed of the subdivision of its land and allocation to private individuals. It cannot be said therefore, that the County Council had no interest in the sub-plots that arose from the subdivisions of Block 2/112/1.
48. Additionally, the surrender of Lease by Wareng County Council did not mean that the land was now available for re-allotment as the Defendants argued. The said surrender only meant that the land reverted back to the Municipal Council of Eldoret. The land comprised in the mother title was still owned by a local government, being the Municipal Council of Eldoret. For that reason, neither parcel no. 2/112/1 the mother title, nor plot No. 2/293, a sub-division thereof, was un-alienated government land at the time the suit property was allocated to the 5th Defendant by the Commissioner of Lands. The land had already been alienated and registered in the name of the Municipal Council of Eldoret.
49. The Commissioner had no powers under the Constitution or any other written law to allocate private or public land which had already been allocated or reserved for a particular public purpose, as the case may be. Section 3(a) of the Government Lands Act Cap 280 (repealed) provided as follows:-
 - “ 3. 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 alienated Government land;”



50. Under the repealed Act, the President could only allocate un-alienated Government land. Section 2 of the Government Land Act (repealed) defined un-alienated land as follows:-

“un-alienated Government land means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.”

51. There can be no question therefore, that having been alienated as such, neither the land comprised in the mother title nor any portion thereto, was available for re-allocation by the Commissioner of Lands. In the case of Nelson Kazungu Chai & 9 others v Pwani University (2014) eKLR, cited the case of Lalitchandra Dugarshankar Padya & Another vs Saled Awale & Another, Mombasa HCCC No. 87 of 2001, Justice Maraga, as he was then held as follows:-

“I am also satisfied and I find that at all material times the suit piece of land was to the knowledge of the Plaintiffs as it is clear from the letters EX 25 and 26, public land vested in the second Defendant (Kenya Railways) for its use as a marshaling yard. At no time did the second defendant surrender it to the Government. It was therefore by virtue of section 9 of the Government Land Act, not available for allocation by the Commissioner of Lands. Its allocation to the people who later transferred it to the Plaintiffs was therefore null and void.”

52. It is my finding that the suit land was already owned by the Municipal Council of Eldoret, and the Commissioner of Lands had no power and/or authority to issue a letter of allotment in respect of the disputed property to a private individual. The letter of allotment issued to the 5th Defendant was thus illegal and unlawful.

53. I have noted that the letter addressed to the Commissioner of Lands dated 23rd December, 1997 was not to inform him of the Surrender of the Lease. The said letter informed the Commissioner of the subdivision and amendment of the RIM. Perhaps the land would only be available for the Commissioner of Lands to re-allocate it if the Lease had been surrendered by the Municipal Council of Eldoret, because it is only then that it would revert back to the Central Government, but that was not the case here. That being the case, the Municipal Council of Eldoret as owner thereof had every right to dispose of or deal with the land as it pleased, including but not limited to leasing it to the Wareng County Council.

54. On the other hand, the allotment letter issued to the 5th Defendant on 2nd January, 1998 required the payment of a stand premium of KShs. 17,500/- and other payments amounting to a total of KShs. 24,270.10/-. Clause 2 of the allotment letter required the payment of the amount via banker's cheque within 30 days. The offer in the letter of allotment was only valid if payment was made on or before the lapse of 30 days from the date of the letter, meaning that it lapsed on 1st February, 1998. The letter states at Page 2 thereof that if acceptance and payment was not made within 30 days, the offer would be considered to have lapsed. I have seen no evidence that this condition was ever met by the 5th Defendant. I am constrained to believe that the money was never paid, thus the offer is deemed to have lapsed.

55. That aside, Plaintiff's erstwhile advocates, the firm of Gicheru & Company Advocates wrote to the Department of Lands in Nairobi on 3rd December, 2014 which letter was produced in court. The letter inquired into the authenticity of the letter of allotment issued to the 5th Defendant. It must be noted that the said letter of allotment was signed by one S. M. Osodo for the Commissioner of Lands. It



is the same S. M. Osodo who responded vide a letter from the National Land Commission dated 5th December, 2014 stating that:-

“Please note that the letter of allotment forwarded vide the above referenced letter purportedly signed by me is not genuine.

The signature is a forgery and the said letter was not prepared by me.”

56. The Defendants did nothing to controvert this evidence presented by the Plaintiff. They neither denied the contents of this letter nor did they attempt to prove that the letter of allotment was genuine and/or authentic and was indeed signed by the said S.M. Osodo on behalf of the Commissioner of Lands. I do not see how in the circumstances the land can be said to have been regularly and/or legally allocated to the 5th Defendant. In *Daudi Kiptugen vs Commissioner of Lands & 4 Others* [2015] eKLR, the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

57. The Defendants have pointed out that the court made a finding in its ruling of 20th March, 2013 that no material had been placed before it to show that the land was acquired unlawfully. It must be noted that the said ruling was made before the hearing of the case and before the parties had presented all the evidence and material relevant to the case.

58. There is also the issue of the 5th Defendant’s age at the time of issuance of the letter of allotment. The Hon. Attorney General submitted that the same only arose during the hearing of the Plaintiff case thus denying them an opportunity to respond. However, this was first raised from the 5th Defendant’s Affidavit of 25th July, 2017 filed in the Plaintiff’s Supplementary List of Documents. The 3rd Defendant had every opportunity to respond to it even during trial. And in fact it was addressed by the 3rd Defendant’s witness DW2 who said she did not know whether in fact a minor could be issued with a letter of allotment.

59. It is thus not true that the 3rd Defendant was denied an opportunity to respond to this issue. In any event, the case of *Galehu vs Komba* (supra) cited by the 3rd and 4th Respondents is distinguished because in that case, the issue was raised on Appeal and was not an issue that fell for determination by the trial court. Moreover, in this case, although the 5th Defendant was indeed an adult in 2012 when the lease was issued, he has by his affidavit dated 25th July, 2017 denied any knowledge of the allocation of the land to him or of his interest therein. He has also denied participating in the transaction that led to transferring the suit land to the 1st and 2nd Defendants.

60. Having considered the facts, and evidence of the parties herein, it is my finding that the land was not available for re-allocation by the Commissioner of Lands to the 5th Defendant. The 1st and 2nd Defendants have therefore failed to prove that the root of their title is clean.

b. Whether the 1st and 2nd Defendants were bonafide purchasers for value and without notice;

61. The 1st and 2nd Defendants pleaded in their defence that they were innocent purchasers for value without notice. The plea that one is an innocent or bonafide purchaser for value, is a defence normally



made against the claims of any prior legal or equitable owner. It is trite that the onus is on the person who wishes to rely on such defence to prove it. The elements to be established where one wishes to rely on this defence were set out in the Ugandan case of *Katende vs Haridar & Company Limited* [2008] 2 E.A.173, where the court held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

62. Value, refers to the consideration paid by the purchaser to the seller in exchange for the land. Although the 1st and 2nd Defendants claimed to be innocent purchasers for value without notice, they only produced a Sale Agreement with no evidence of any payments made to or received by the 5th Defendant. While innocence is inferred, both value and notice are questions of fact, which the 1st and 2nd Defendants needed to establish if they intended the court to that they were innocent purchasers for value without notice.
63. I am not convinced that the 1st and 2nd Defendants can claim lack of notice in this case. Going by the 1st Defendant’s testimony, their point person was one Laban Mayodi, who is alleged to be the 5th Defendant’s father. It appears that they never dealt with the 5th Defendant, the actual registered owner of the suit property during the transaction. This lends credence to the contents of the 5th Defendant’s Affidavit dated 25th July, 2017 where he deponed that he never authorised any one to enter any form of transaction in relation to the suit property. The 5th Defendant further deponed that anyone purporting to have transacted on his behalf did so without his knowledge and authority. This casts a shadow on the entire transaction, and one must wonder whether the transfer of land form was signed by the 5th Defendant or the said Mr. Laban Mayodi. Even though they were aware of the contents of the said affidavit, the 1st and 2nd Defendants produced no evidence to controvert it.
64. If indeed the land was bought from the 5th Defendant, the 1st and 2nd Defendant ought to have endeavoured to have him come and testify in support of the transaction, but they did not. I note that the 1st Defendant testified that he reached out to the 5th Defendant to testify, but he claimed his life was in danger and refused to testify. There is no evidence that the 1st, 2nd and 5th Defendants ever made any report on the alleged threats, and this unfortunately remains to be mere allegations not substantiated by proof. I note from the record that the 5th Defendant appeared in court once asking to be taken out of these proceedings but he did not inform the court of any such threats.



65. As already discussed in the foregoing paragraphs, the issuance of the letter of allotment by the Commissioner of Lands to the 5th Defendant and the Lease issued pursuant thereto was null and void ab initio and ineffectual to confer any right, interest or title upon him in the first instance. Since the title held by the 5th Defendant was defective, he could not pass good title to the 1st and 2nd Defendants, and therefore the transfer of the suit land to them was null and void.
66. Moreover, the 1st and 2nd Defendants have not satisfied this court that they conducted any due diligence before purchasing the land to satisfy themselves that indeed there was no defect on the title. DW1 alleges that he conducted a search but there is no proof that he did so as no search certificate was produced in court. Allegedly, his agent visited the lands office to confirm whether all the documents were in order but they have nothing to show in support of this contention. It appears they chose to take the word of this supposed agent at face value instead of confirming the true state of affairs. They also did not deem it fit to present this agent in court to testify. There is no evidence that the 1st and 2nd Defendants conducted any due diligence before buying the land, they cannot thus be heard to say that they are innocent purchasers.
67. In addition, the transfer required a rent clearance certificate, but as DW2 testified, there was none present in the parcel file and she could not tell whether one was obtained. Aside from that, DW2 was shown DEX4, which is the Consent of the Commissioner of Lands dated 5th September, 2012 and she could not tell who issued the consent. Although she could not confirm that it was a forgery, she was clear that they were not the authors of the letter of consent. Although DW2 later went on to change her testimony on the origin of the letter of consent, I have seen the letter dated 20th January, 2022 from one Matheka J.N., the County Land Administrator. In it, he indicated that the letter of consent dated 5th September, 2012 did not originate from the Lands Office. No evidence was placed before this court to disprove the contents of the letter from the County Land Administrator.
68. That being the case, I do not see how the Defendants can claim that the transfer to the 1st and 2nd Defendants was done after all the requisite documents were presented or that it was regular and followed procedure. The 1st and 2nd Defendants can only claim an absolute and indefeasible title if and only if the transfer to them followed the laid-down procedure and they presented all the requisite documentation for the transfer to be effected. The totality of the discussion under this head is that the 1st and 2nd Defendants failed to establish that they are indeed bonafide or innocent purchasers for value without notice of the defect in the title.

c. Whether the Plaintiff is entitled to the orders sought in the Plaintiff;

69. The court has already made a finding on the genuineness of the title documents held by the 1st and 2nd Defendants. The Plaintiff asked that the Lease issued to the 1st and 2nd Defendant in respect of the suit property be revoked and/or cancelled. Section 26 of the Land Registration Act is clear that a title obtained by illegal/irregular means may be cancelled. The Court of Appeal in *Chemey Investment Ltd vs Attorney General & 2 others* (2018) eKLR categorically stated that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense. Having found that the suit land was irregularly and unlawfully allocated to the 5th Defendant, it follows that the 5th Defendant's title should and must be revoked and/or cancelled. This court will therefore not hesitate to cancel the 5th Defendant's Certificate of Lease.
70. As to what happens to the 1st and 2nd Defendants' interest in the suit land, I have discussed already that the 5th Defendant had no interest in the suit property capable of being sold and transferred to them. I



will thus borrow a lead from Justice Munyao Sila, who in *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others* (2015) eKLR, held that:-

“ 14. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows :-

“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

I stand by the above words and I am unable to put it better than I did in the said dictum.

15. In our case, there is no doubt that in so far as the title of the 1st respondent is concerned, it was procured by way of fraud or misrepresentation, and there is no way that the 1st respondent could have procured title without his own involvement in the fraud or misrepresentation. The title of the 1st respondent is clearly impeachable by dint of the provisions of Section 26 (1) (a). It cannot be allowed to stand and must be cancelled. If it is cancelled then it follows that any subsequent transactions have to be cancelled as well, for they were entered into by a party who had no capacity to do so, he not having a title in the first place.” Emphasis mine

71. The Certificate of Lease held by the 1st and 2nd Defendant will therefore suffer the same fate, for reason that it was obtained from a person who held no interest in the land capable of being transferred.
72. The Plaintiff also asked that the Court do issue a permanent injunction against the 1st, 2nd and 3rd Defendant barring them from interfering or otherwise dealing with the suit property. The principles for the grant of an injunction were established in the celebrated case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358. The Plaintiff has proved that the 5th Defendant did not lawfully acquire the suit property herein and could not therefore transfer it to the 1st and 2nd Defendants. The Defendants have no legal mandate to use the suit property. Although the Plaintiff is yet to be duly registered as owner thereof, he is the original allottee having paid the required purchase price per the letter of allotment issued to him. He is at the moment the beneficial owner of the land and is thus entitled to the order of permanent injunction.
73. Finally, the Plaintiff also asked for costs of the suit. Having succeeded in his case against the Defendants, I see no reason why this court should not exercise its discretion and award him the costs of this suit. In the absence of any such reason, I will award him the costs of the suit as prayed.
74. Consequently, judgment is entered in favour of the Plaintiff against the Defendants in the following terms:-



- a. A declaration be and is hereby issued that the letter of allotment reference no. 31710/XXXXIX dated the 2nd of January 1998 that was issued to Sedylene Ben Odari as well as the Certificate of Lease issued in his name are null and void.
- b. A declaration be and is hereby issued that the Transfer of the suit property and the Certificate of Lease issued on registration thereof and in possession of the 1st and 2nd Defendants is null and void.
- c. An order is hereby issued directing the 3rd Defendant to revoke and/or cancel the title documents registered issued and in possession of the 1st and 2nd Defendants.
- d. A permanent injunction is hereby issued against the 1st, 2nd and 3rd Defendants, by themselves or anybody acting on their behalf restraining them from interfering, subdividing, alienating, transferring, leasing or selling the suit property amongst themselves or any other third party.
- e. The Plaintiff shall have the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 6TH DAY OF FEBRUARY 2025.

J. M ONYANGO

JUDGE

In the virtual presence of:

Mr Mathai for the Plaintiff

Ms Ngeywo for Mr Kidiavai for the 1st and 2nd Defendants

No appearance for the 3rd and 4th Defendant

Court Assistant: Hinga

