



**Fresh N Nice Limited v County Government of Isiolo & 2 others;  
Ethics and Anti-Corruption Commission (Interested Party) (Petition  
E003 of 2023) [2025] KEELC 4459 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4459 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
PETITION E003 OF 2023**

**JO MBOYA, J  
JUNE 5, 2025**

**BETWEEN**

**FRESH N NICE LIMITED ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF ISIOLO ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF INVESTMENTS, TRADE AND INDUSTRIALIZATION .... 2<sup>ND</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION .... INTERESTED  
PARTY**

**JUDGMENT**

1. The Petitioner has approached the court vide Petition dated 3<sup>rd</sup> October 2023; and wherein the Petitioner has sought various reliefs as hereunder:
  - i. A declaration that the petitioner is the lawful and registered proprietor of land Reference number 7918/735 situated in Isiolo township and thus private land.
  - ii. A declaration that the Respondents' through agents and or contractors, illegal actions have infringed the petitioner's right to own property and right to fair administrative action.
  - iii. An order of Permanent injunction to prohibit the Respondents, their agents and or servants from constructing or erecting structures on the petitioner's Land, Land Reference number 7918/735 situated in Isiolo township.



- iv An order of Mandamus to compel the Respondents jointly and severally to remove all building plant and machinery as well as building material deposited on the Petitioner's property and to restore the property to its previous status removing therefrom any structure, temporary or permanent, including perimeter walls and barbed wires or chain link fences.
  - v An order of Certiorari calling the decision by the Respondent to appropriate the Petitioner's land into this court and quashing it.
  - vi. An order of Damages for breach of the petitioner's constitutional right and trespass.
  - vii. Costs hereof be provided for.
  - viii. Any other relief that this Honourable Court deems fit and just
2. The subject petition is anchored on various grounds which have been enumerated in the body thereof. In addition, the petition is supported by the affidavit of one, MUSTAFA ABDI AMAN sworn on 3<sup>rd</sup> October 2023 and supplementary affidavit sworn on 8<sup>th</sup> January 2024. Moreover, the deponent of the affidavits has annexed various documents including a copy of the certificate of title in respect of LR No. 1718/735 [IR No. 6481] [hereinafter referred to as the suit property].
  3. The 1<sup>st</sup> Respondent duly entered appearance and thereafter filed a replying affidavit sworn on the 3<sup>rd</sup> November 2023 and to which affidavit the deponent, namely; YUSUF DAHIR has annexed a plethora of documents. In particular, the deponent of the replying affidavit has annexed a copy of the Plaint vide ELC No. E 004 of 2021 being a suit filed by the Ethics and Anti- Corruption Commission v the Petitioner herein and wherein the commission [EACC] has sought to impeach the certificate of title held by the Petitioner.
  4. Additionally, the deponent of the replying affidavit has also annexed a copy of the statement defence filed by the petitioner herein as well as various documents demonstrating that what constitute[s] the suit property was curved out of a parcel of land which had hitherto been preserved as prison land. To this end, it has been averred that in so far as the land giving birth to the suit property was already reserved as prison land and duly gazetted, [suit property] was not available for allocation or at all.
  5. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents neither enter appearance nor filed any response.
  6. The Ethics and Anti-Corruption commission [EACC] sought and obtained leave to be enjoined as an Interested Party in this matter. Following the joinder of the commission as an interested party, same [commission] entered appearance and filed a replying affidavit sworn by Everline Odipo and wherein the deponent contended that what constitute the suit property was curved out of land that had hitherto gazetted and preserved as prison land. Furthermore, it was contended that the allocation of the suit property to the Petitioner and the consequential processes culminating into the issuance of the certificate of title are thereof illegal, unlawful and void.
  7. The subject petition came up for direction[s] on the 28<sup>th</sup> January 2025; and whereupon the advocates for the parties covenanted to canvass the position on the basis of affidavit evidence. Moreover, the parties thereafter sought to file and exchange written submissions.
  8. Flowing from the agreement by the parties, the court proceeded to and gave directions pertaining to the hearing and disposal of the petition. Furthermore, the court circumscribed the timeline[s] for the filing and exchange the written submissions.
  9. The Petitioner filed written submissions and wherein the Petitioner adopted and reiterated the grounds enumerated in the body of the petition. In addition, the Petitioner also adopted and reiterated the



contents of the two sets of affidavits, namely; the supporting affidavit sworn on the 3<sup>rd</sup> October 2023; and Supplementary affidavit sworn on 8<sup>th</sup> January 2024.

10. Additionally, the Petitioner ventured forward and highlighted three [3] key issues, namely; that the petitioner is the lawful and registered proprietor of the suit property; the Petitioner by virtue of its ownership of the suit property has accrued lawful and legitimate rights thereto; and the actions by the respondents constitute violation of the petitioner's property rights.
11. Regarding the first issue, namely; that the Petitioner is the lawfully and register proprietor of the Suit Property, learned counsel for the petitioner has submitted that the Petitioner herein was lawfully allocated the suit property by the commissioner of lands [now defunct]. Furthermore, it was contented that upon being allocated the suit property, the petitioner duly complied with the terms of the letter of allotment and was subsequently issued with a certificate of title on 12<sup>th</sup> august 2016. In particular, learned counsel has referenced annexure MAN1 attached to the supporting affidavit.
12. It was further submitted that the certificate of title issued to and in favour of the Petitioner has neither been impeached nor cancelled. To this end, learned counsel has contented that on the basis of certificate of title, the Petitioner is the lawful registered proprietor of the suit property.
13. Secondly, learned counsel for the Petitioner has submitted that by virtue of being the lawful and registered proprietor of the registered property, the Petitioner is therefore vested and bestowed with statutory rights and privileges including the right to exclusive occupation, possession and use of the suit property.
14. Flowing from the forgoing, learned counsel for the Petitioner has therefore submitted that the Petitioner is entitled to exclusive possession and use of the property. To this end, counsel has contended that any action that is intended to deprive the Petitioner of its rights to the suit land are thus unconstitutional. In this regard, learned counsel has cited the provisions of Article 40 and 64 of [\*the constitution\*](#), 2010.
15. As concerns the third issue, learned counsel for the Petitioner has submitted that despite the petitioner being the lawful and registered proprietor of the suit property, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have since invited tender and commissioned a project namely; County Aggregation and industrial Parks- Isiolo and which a construction is being undertaken on the suit property. Furthermore, it has been posited that the impugned actions have been undertaken without due regard to the Petitioner's property rights over the suit property. In this regard, learned counsel has submitted that the actions complained of are thus illegal, unconstitutional and constitute trespass.
16. Arising from the forgoing submissions, learned counsel for the Petitioner has therefore implored the court to find and hold that the actions complained of have violated the Petitioner's right. In this regard, the court has been invited to protect the Petitioner's right[s] by granting the reliefs sought at the foot of the petition.
17. The 1<sup>st</sup> Respondent filed written submissions dated 19<sup>th</sup> March 2025 and wherein the 1<sup>st</sup> Respondent has adopted and reiterated the contents of the replying affidavit sworn on 30<sup>th</sup> November 2023; as well as the contents of the annexures thereto. Moreover, the 1<sup>st</sup> Respondent has thereafter highlighted two [2] key issues for consideration by the court.
18. The issues highlighted by the 1<sup>st</sup> Respondent are namely: the Petition beforehand constitute[s] an abuse of the due process of the court and same is barred by the doctrine of res sub judice; the Petitioner's title is vitiated by illegality and same is thus invalid.



19. Regarding the 1<sup>st</sup> issue, namely; the petition beforehand constitutes an abuse of the due process of the court and same is barred by the doctrine of sub judice, it has been submitted that the instant petition has been filed with the sole purpose of defeating and of circumventing the suit filed by the Ethics and Anti- corruption Commission, which is intended to recover the suit property. Moreover, it has been submitted that the petitioner was aware and knowledgeable of the existence of the suit by the interested party but still went ahead and filed the petition.
20. To this end, learned counsel for the 1<sup>st</sup> Respondent has submitted that the entire petition is contrary to and violates the doctrine of res sub judice. In addition, it has been submitted that the filing of the petition on the face of an existing suit, namely; ELC E004 OF 2021, constitutes an abuse of the due process of the court.
21. To buttress the submissions on abuse on due process of court and the doctrine of res sub judice, learned counsel has cited and referenced the supreme court decision in Kenya National Commission on Human rights v Attorney General: Independent Electoral and Boundaries Commission and 16 others [interested parties] [2020] eKLR.
22. In respect of the second issue, learned counsel for the 1<sup>st</sup> Respondent has submitted that what constitute[s] the suit property was curved out of land that had previously been preserved and constituted as prison land. In this regard, it has been posited that the land in question was therefore not available for allocation and or alienation.
23. Finally, learned counsel for the 1<sup>st</sup> Respondent has also submitted that the dispute before hand is already being dealt with in a civil suit and therefore it was not appropriate for the Petitioner to file the subject constitutional petition. For good measure, learned counsel has submitted that it behoved the petitioner to exhaust the mechanism provided for under statute before resorting to the filing of the constitutional petition. To this end, learned counsel for the 1<sup>st</sup> Respondent has therefore cited and referenced the doctrine of exhausting; the doctrine of constitutional avoidance and the doctrine of ripeness/ justiciability.
24. In support of the forgoing submissions, learned counsel for the 1<sup>st</sup> Respondent has thereafter cited and invoked various decisions; namely Attorney general and 2 others v Ndi & 79 others; Dixon and 7 others [Amicus curia ] [2022], communication commissions of kenya and 5 others v royal media services limited and 5 others [2014] kesc 53; and Albert Cha Urembo Mumba and 7 others v Morris Munyao and 148 Others [2019] kesc respectively.
25. Premised on the foregoing submissions, learned counsel has invited the court to find and hold that the Petition beforehand is not only misconceived but constitute[s] an abuse of the court process. To this end, the court has been invited the Court to dismiss the Petition with Costs.
26. The Interested Party filed written submissions dated 12<sup>th</sup> March 2025; and wherein same has raised and canvassed two [2] issue, namely; that the petition is prohibited by the doctrine of res sub judice on the basis on an existing suit; and the suit property was illegally procured and thus the petitioner does not enjoy the constitutional protection in terms of Article 40(3) of *the Constitution*, 2010.
27. The Learned counsel for the Interested Party has thereafter regurgitated the same submissions that were highlighted by the 1<sup>st</sup> Respondent. Furthermore, learned counsel for the interested party has cited and referenced two decisions namely, Joel Kenduiywo v the District Criminal investigation officer Nandi and 4 others [2019] eKLR and Neptune credit management limited and another v the Chief Magistrates court and 2 others [2005] eKLR.



28. Having appraised the Petition, the supporting affidavit thereto, the responses filed and having considered the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the subject petition turn[s] on two [2] key issues, namely; whether the Petitioner has proven that same is the lawful and registered proprietor of the suit property and thus entitled to the requisite protection or otherwise; and whether the subject petition constitute[s] an abuse of the due process of the court or otherwise.
29. Regarding the First issue , to wit, whether the Petitioner has proven that same is the lawful and registered proprietor of the suit property and thus entitled to the requisite protection or otherwise, it is imperative to recall and reiterate that the petitioner has approached the court contending that same [Petitioner] is the lawful and legitimate proprietor of the suit property. To this end, the petitioner has therefore posited that same is entitled to partake of and benefit from the statutory rights and privileges attaching to ownership of land.
30. Moreover, the Petitioner has contended that same was lawfully allocated what now constitutes the suit property by the commissioner of lands [now defunct] and thereafter same[petitioner] duly complied with the terms of the letter of allotment. In addition, it has been contended that thereafter the petitioner was duly issued with a certificate of title underpinning its ownership to the suit property.
31. Flowing from the forgoing position, the petitioner has therefore implored the court to find and proclaim that same is entitled to partake of and benefit from the Constitutional right to own property.
32. Additionally, the Petitioner has submitted that on the basis of holding a certificate of title, same is therefore entitled to invoke and rely of the provisions of article 40(3) of *the Constitution* 2010. Furthermore, the petitioner has also invoked the doctrine of indefeasibility of title.
33. The 1<sup>st</sup> Respondent on his part filed a very elaborate replying affidavit and wherein it was contended that what constitutes the suit property was hitherto trust land and which fell within the jurisdiction of the 1<sup>st</sup> respondent. To this end, it has been contended that what constitutes the suit property could therefore not be allocated by the commissioner of lands [now defunct] without the approval and recommendation[s] of the County Council of Isiolo [now defunct].
34. Moreover, it has been contended that even though the Petitioner was issued with a letter of allotment, the said letter of allotment was illegal and unlawful in so far as the land in question stood alienated on the basis of reservation. In any event, it was posited that the land in question had been duly gazetted as prison land.
35. Premised on the foregoing, the 1<sup>st</sup> Respondent has contended that the certificate of title which is held by the petitioner, is a product of an illegal and unlawful process. In this regard, it has been submitted that the impugned certificate of title is therefore vitiated and thus illegal.
36. The question that does arise and which the court must grapple with is whether the certificate of title held by the petitioner was lawfully acquired and furthermore, whether the Petitioner is entitled to partake of the benefits attaching to the doctrine of indefeasibility of title.
37. To start with, it is common ground that a certificate of title or certificate of lease [whichever is the case] is an end product. In this regard, it then means that the mere fact that a person, the petitioner not expected holds a certificate of title does not by and of itself denote that that certificate of title is conclusive evidence of ownership.
38. Suffice it to state that where the certificate of title like the one before hand is challenged or better still, where its validity is impugned, then it behoves the bearer to account of the certificate of title and in



particular, to demonstrate the process leading to the acquisition of title. This to my mind, is what constitutes proving or demonstrating the root of the title.

39. To underscore the forgoing observation, it suffices to cite and reference the holding of the Court of Appeal in the case of *Mas Construction Limited v Sheikh & 6 others* (Civil Appeal E789 of 2023) [2025] KECA 349 (KLR) (28 February 2025) (Judgment); where the Court expounded on the issue thus:

68. It is an indisputable fact that the appellant and the Abduls claim ownership and/or title to the same parcel of land. This Court in *Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School* (Civil Appeal 64 of 2014) [2023] KECA 371 (KLR) (31 March 2023) (Judgment) stated as follows regarding a claim over the existence of two titles in respect of the same parcel land: “

The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of title is the deed to which title to a property is ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title, starting with a "good root of title." A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements:

- (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question;
- (b) it must contain a recognizable description of the property;
- (c) it must not contain anything that casts any doubt on the title.”

69. In the same vein, this Court in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR 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.”

40. The necessity to prove the root of the title, namely to justify the legality of the process underpinning the issuance of the certificate of title, has also been elaborated upon by the Supreme Court [the apex court]. In the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment)

108. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of *Funzi Development Ltd & others v County Council of Kwale*, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR the Court of Appeal, which decision this court affirmed, stated that:

“...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of



indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”

109. We note that the suit property was subsequently converted and HE Daniel T Arap Moi registered as owner and obtained a freehold title. Further, the suit property herein is within the then Mombasa municipality. Contrary to the appellant’s averment, section 10 of the GLA is applicable. Being a town plot, within the jurisdiction of the 1st respondent and its predecessor, it ought to have been an allocation for a lease for a term not exceeding 100 years.
110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co [1993] Ltd, who in turn could pass to the appellant.
41. Bearing in mind the dicta espoused in the decisions [supra] it is now appropriate to revert to the subject matter and to interrogate whether the certificate of title held by the Petitioner is lawful and legitimate or otherwise.
42. Put differently, it is now apposite to investigate whether the Petitioner has established and proven the root or validity of its certificate of title to warrant a proclamation that the Petitioner is the lawful proprietor of the suit property.
43. It is common ground that what constitutes the suit property was hitherto trust land which fell under the management and administration of the local authorities as previously established under the Local Government Act, Chapter 265, Laws of Kenya [now repealed].
44. Additionally, its worth recalling that by virtue of having been of trust land, the allocation or better still the alienation of the suit property could only be undertaken in accordance with the provisions of section 53 of the Trust *Land Act*, Chapter 288 [now repealed].
45. Notably, the allocation of land which formed part of the trust land would require that the intended allottee [applicant] to apply to the designated local authority seeking to be allocated land. Upon receipt of such application, the designated local authority, in this case the County council of Isiolo [now defunct], would thereafter consider the application/ request for allotment. To this end, the designated local authority would discern whether the land applied for is available for allotment or otherwise. If available, the designated local authority would approve the request and recommend allotment.
46. Instructively, the approval of the application and recommendations by the designated local authority [in this case, the county council of Isiolo] would thereafter be escalated to the commissioner of land [now defunct] for purposes of allotment by issuance of a letter of allotment.
47. It is pertinent to observe that though the commissioner of lands was bestowed with the mandate and authority to allocate/ alienate trust land, the powers to allocate such land was subject to the recommendations and approval of the designated local authority. Simply put, the power to allocate part of trust land did not exclusively inhere in the Commissioner of lands [now defunct]
48. The process pertaining to alienation/ allocation of trust land was aptly and succinctly elaborated upon by the Court of Appeal in the case of Ethics and Anti-Corruption v Eunice N. Mogalia and another



Civil Appeal No. 39 of 2019 [court of appeal at Kisumu] [unreported] where the Court of Appeal stated at paragraph thus;

“ 32. The first respondent was purportedly allocated government land under the government lands act and was to be issued with a certificate of lease in the form of a grant under the registration of titles act. How a government grant that was issued and accepted by the 1<sup>st</sup> respondent under the government lands act pursuant to which the government was to be the lessor changed to be the lease under the registered land act under which the municipal council of Kakamega became the lessee is a mystery.

As we have already stated, the government land act vested in the president and the commissioner of lands power to alienate government land as long as the procedure laid out in the act was followed. Trust land act on the other hand vested in the county council the power to alienate the land in their respective counties and the commissioner of lands had no power to alienate the same save as directed by the county council through a resolution. In the circumstances, we do not see how the letter of allotment dated 31<sup>st</sup> July 1998 under which the commissioner of lands offered to the 1<sup>st</sup> respondent a grant of the government land could have given rise to the lease dated 2<sup>nd</sup> June 2000 of trust land that was vested in the municipal council of Kakamega. So under what regime of the law was the commissioner of lands acting when he alienated the suit property? We ask this question because the two legal regimes, that is the government lands act and the trust land act have different processes as regards to alienation of land”. [Underlining Supplied].

49. From the decisions [supra], it was incumbent upon the Petitioner to place before the court evidence of an application [if any] that same made to the county council of Isiolo [now defunct] seeking to be allocated the suit land. In addition, it was equally the duty of the Petitioner to place before the court evidence in terms of minutes of the council approving and recommending the application for allotment of land.
50. Nevertheless, it is not lost on the court that the only document which the Petitioner has espoused is a copy of the certificate of title. To this end, it appears that the Petitioners' whole case rests and is merely underpinned by the certificate of title. Nothing else.
51. To my mind, there is no gainsaying that a certificate of title is an end product. Being an end product, it cannot be utilized and deployed to prove its authenticity. Pertinently, proof of the authenticity of the certificate of title would require adduction of the transactional/background documents demonstrating how the same was procure. The means of acquisition and validity thereof would bespeak the legality of [sic] the Title.
52. In my humble, albeit considered view, the transactional/background documents which ought to have been tendered in an endeavour to prove the root of the certificate of title included a copy of the application for allotment; minutes of the county government of Isiolo; the letter of no objection by the county government of Isiolo; the duly approved part development plan underpinning the availability of the land in question; and the letter of allotment issued in accordance with the provisions of Section 3 of the Government land act Chapter 280 Laws of Kenya [now repealed].
53. In the absence of the transactional documents to demystify the process of acquisition and ultimate issuance of the certificate of title, it becomes apparent that the certificate of title held by the petitioner



was procured un-procedurally, illegally and in contravention of the Law. Simply put, the Certificate of Title was procured in vacuum.

54. Pertinently, one, the petitioner not excepted can not seek to deploy a certificate of title as proof of legitimate ownership irrespective of its acquisition. Such kind of endeavour could bring to fore the Machiavellian principle of the end justifies the means and not the other way round.
55. Moreover, it is worthy to recall and reiterating that the doctrine of indefeasibility of title cannot by and of itself be deployed to countenance an illegality. For good measure, where a title is procured un-procedurally; irregularly; illegally; or out of a corrupt scheme, such a title must not accrue the legal protection enshrined vide article 40(3) of *the constitution*, 2010.
56. To buttress the foregoing exposition of the law, it suffices to reference and take cognisance of the holding of the Court of Appeal in the case of Chemey Investment Limited v Attorney General & 2 others [2018] KECA 863 (KLR) where the Court stated thus:

The above provisions have consistently been held to guarantee sanctity of title, which cannot be defeated except on the specific and serious grounds set out therein. However, we must hasten to add that title to property that is obtained fraudulently or illegally in violation of the provisions of the statute is and was not sacrosanct and did not enjoy protection of the law under the repealed Act. Recently in, Denis Noel Mukhulo & Another v Elizabeth Murungari Njoroge & Another, *CA No. 298 of 2013*, this Court explained the situation as follows:

“While we agree with the appellants that title registered under the Registered *Land Act* was sacrosanct, we are not able to agree that the Act protected title registered under it in all and sundry cases, irrespective of how the title was acquired. By section 27 of the Act, the registration of a person as a proprietor of land vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto, while section 28 of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act, which really does not afford the blanket protection that the appellants claim it did. Section 143 of the Act, which granted the court power to order rectification of the register provided as follows...The effect of the above provision is that the court had power to order rectification, save in the case of a first registration, where the registration was obtained by fraud or mistake to which the registered person was party.”

Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd & 2 Others v County Council of Kwale (supra); Republic

- v Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v Shalien Masood Mughal & 5 Others [2017] eKLR; Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumarn Shah & Others v City Council of Nairobi & Others, HCCC



No. 1024 of 2005. The effect of all those decisions is 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.

57. Likewise, the position of the law that an illegally obtained title cannot accrue the protection of the law was also highlighted in the case of *Wambui v Mwangi & 3 others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (19 November 2021) (Judgment), where the Court stated thus:
64. The jurisprudence relied upon by the appellant and which we find prudent not to replicate are as already highlighted above. We have given due consideration to them in light of the record as assessed herein by us. Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedural or otherwise a product of a corrupt scheme.
58. Having appraised the evidence that was placed before the court by the Petitioner, and taking into account that the burden of proof rested on the petitioner, I am afraid that the petitioner did not discharge the onus placed on his shoulders to prove that the certificate of title was lawfully and legally acquired. To this end, I am unable to return a finding that the petitioner is the lawful and legitimate proprietor of the suit property.
59. I hasten to state and underscore that though the certificate of title held by the Petitioner has not been revoked and or nullified, the mere holding of the said certificate of title [which was procured in vacuum] cannot bestow the Petitioner with right to the suit property. [See the Case of Attorney General and Another v Abdi Adan Hussein and 4 Others [2025] KECA [Judgment]].
60. Furthermore, it is also imperative to recall that the 1<sup>st</sup> Respondent placed before the court evidence that what constituted the suit property was curved out of land that had been reserved and gazetted as prison land. To this end, the replying affidavit by Yusuf Dahir sworn on the 30<sup>th</sup> November 2024; has exhibited a copy of the gazette notice and the PDP reserving the land for use by the prison.
61. It then means that by the time the suit property was being curved out and being allocated to the Petitioner, the land itself was not unalienated government land capable of being allocated by the commissioner of lands [now defunct] [See section 2 of the government *land act* Chapter 280 laws of Kenya] [see also *Kiluwa Limited & another v Business Liaison Company Limited & 3 others* (Petition 14 of 2017) [2021] KESC 37 (KLR) (6 August 2021) (Judgment); see also *Frann Investment Limited v Kenya Anti-Corruption Commission & 6 others* (Civil Appeal E038 of 2021) [2024] KECA 714 (KLR) (21 June 2024) (Judgment)].
62. Additionally, it is important to reiterate that the commissioner of land [defunct] could only allocate an existing and available government land which was unalienated.
63. On the contrary, the commissioner of lands could not purport to issue a letter of allotment where the land sought to be alienated stood allocated; leased; and or reserved for a designated government purpose [See the decision of the Court of Appeal in the case of *Kipsirgoi investment limited v Kenya Anti-corruption commission* [2013] eKLR.
64. Further and in any event, it is elementary that a letter of allotment must relate to an existing land and not otherwise. The Court of Appeal in the case of *Benja Properties Limited v Syedna Mohammed*



Burhannudin Sahed & 4 others [2015] KECA 457 (KLR) expounded the legal position in the following manner;

25. In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5<sup>th</sup> respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.
65. My answer to issue number one [1] is threefold. Firstly, the Petitioner herein was obligated to place before the court the transactional documents underpinning the allotment of the suit property. However, no such documents were ever tendered. The dearth of documents on behalf of the petitioner negates the validity of the petitioner's title.
66. Secondly, the land which birthed the suit property stood alienated on the basis of reservation. In particular, the land in question was duly reserved and gazetted for use by the prison. Consequently, the land did not form and or constitute unalienated government land capable of being allocated. [See the provisions of Section 3 of the Physical Planning Act, Chapter 286, Laws of Kenya, [now repealed].
67. Thirdly, the mere fact that the petitioner has/holds a certificate of title does not by and of itself denote that the said title is lawful and legitimate. Instructively, the certificate of title was coloured with illegality and irregularities. To this end, the certificate of title cannot accrue and or attract the protection underpinned by article 40(3) of *the Constitution*, 2010.
68. Next is the issue of whether the subject petition constitute[s] an abuse of the due process of the court. To start with, it is instructive to recall that the Ethics and Anti-Corruption Commission had filed a Civil suit, namely; Isiolo ELC E004 of 2021 and wherein the commission sought to invalidate the petitioner's title to the suit property.
69. Subsequently, the Petitioner herein duly entered an appearance and filed a statement of defence. To this end, it is important to point out that the petitioner was therefore privy to and aware of the previous suit which sought to impeach its title. In any event, the fact that the Petitioner's title was under challenge vide the previous suit has been acknowledged by the petitioner of paragraph 3 of the supporting affidavit of Mustafa Abdi Aman.
70. Despite the fact that the petitioner was privy to and or knowledgeable of the said suit, same was still brave to file the subject petition seeking to have its title declared lawful, even though the said title was the subject of the previous proceedings.
71. To my mind, the Petitioner herein ought and should have filed a counterclaim in the previous suit to canvass and ventilate the issues before hand. For good measure, the issues that colour the subject petition are the same or similar issues that underpin the previous issues.
72. In the premises, I hold the humble view that the petitioner herein was barred and prohibited from filing a fresh suit including the current petition during the pendency of Isiolo ELC E004 of 2021. Notably, the subject petition is clearly prohibited by the doctrine of res sub judice. [ See the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya].
73. Suffice it to posit that what constitutes res sub judice has previously been expounded and elaborated upon. In the case of Kenya National Commission on Human Rights v Attorney General; *Independent*



*Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017)* [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling), the Supreme Court expounded on the ingredients that underpin the scope of res sub judice as hereunder:

67. The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as:

“Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

74. In my humble view, the Petitioner herein was aware of the previous suit and thus same ought not to have filed the petition. To this end, it’s my finding and holding that the instant petition is/ was prohibited by the doctrine of res sub judice.
75. Moreover, the Petitioner filed the instate suit knowing that the legitimacy of its title was under challenge. In fact, the process leading to the acquisition of the certificate of title was seriously in question.
76. It becomes apparent that the filing of the instant petition was a deliberate and premeditated scheme to pull the rug from the feet of the interested party herein who had hitherto filed the recovery proceeding[s]. It was a deliberate attempt to procure a judgment in rem and thereby gag the Interested Party from pursuing the previous suit and in particular, from challenging the impugned certificate of title.
77. I hold the view that it was not lawful for the petitioner herein to rush to court vide the current petition merely to scatter the previous court process or better still to procure a judgement in rem and thereafter to deploy same to defeat a lawful court process.
78. Instructively, the Petitioner appears to have been keen to procure a judgment in rem vide this petition and thereafter deploy the provisions of Section 44 of the *Evidence Act* Chapter 80, laws of Kenya; in vindicating the title of the suit property.
79. Simply put, I hold that the instant petition constitutes and amounts to an abuse of the due process of the court on the basis of premeditated scheme to defeat the orders sought vide ELC E004 of 2021; as well as on the basis of the doctrine of res sub judice.
80. Before concluding the subject issue, it is important to take cognizance of the fact that the concept of abuse of the court process is one that is incapable of finite or exhaustive definition. However, it suffices to posit that the concept takes various perspectives and shades. Nevertheless, what is imperative is the net effect of a process and or endeavour being deployed by a particular litigant.
81. Where that suit and or petition [like the instant one] is filed for collateral purposes, then such a suit no doubt falls within the circumference of abuse of the due process of the court.



82. The Supreme Court of Kenya [ the apex Court] in the case of Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016) [2018] KESC 27 (KLR) (19 September 2018) (Ruling) stated thus;

27. In Kenya Section of the International Commission of Jurists v Attorney General & 2 Others Criminal Appeal No. 1 of 2012; [2012]eKLR, this Court, on the issue of abuse of the process of the Court, held inter alia:“The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice. The bottom line in a case of abuse of Court process is that, it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption...”

Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process.”

83. Without belabouring the point, I come to the conclusion that the petition herein constitutes and amount[s] abuse of court process. For good measure and taking into account the provisions of section 1[A] and 1[B] of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; and coupled with the overriding objectives of the court, the petition beforehand ought not to have been filed.

84. It is clearly an abuse of the court process.

**Final Disposition:**

85. Flowing from the analysis which has been highlighted in the body of the Judgement, it must have become apparent that the petitioner herein has not been able to account for and or establish the root of the title to the suit property.

86. Further and in any event, it is imperative to underscore that the burden of doing so laid on the shoulders of the petitioners. Moreover, such failure constitutes a recipe for Dismissal of the Petition.

87. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder;

i. The Petition be and is hereby Dismissed.

ii. Cost[s] of the Petition be and are hereby awarded to the 1<sup>st</sup> respondent and the Interested Party only.

iii. The Costs in terms of [ii above] shall be agreed upon and in default to be taxed in the conventional manner.

iv Even though I have found and held that the Petitioner did not accrue and or acquire lawful title to the suit property, I have restrained myself from venturing forward to address the question of revocation because the said issue is sub judice ELC E004 of 2021.

88. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 5<sup>TH</sup> DAY OF JUNE 2025**

**OGUTTU MBOYA, FCIArb; CPM [MTI-EA].**

**JUDGE**

In the presence of:

Ms Mukami- Court Assistant



Mr A.K Mwangi holding brief for Mr. Aruth Ingutya for the Petitioner

Mr. Koome Murithi for the 1<sup>st</sup> Respondent

Mr Munene for the Interested Party

N/A for 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

