Mwamwero v Njuna & 2 others (Environment and Land Case E043 of 2023) [2025] KEELC 5250 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5250 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CASE E043 OF 2023

LL NAIKUNI, J

JULY 11, 2025

BETWEEN

LUVUNO MWAMWERO ..... PLAINTIFF

AND

GEOFREY MAINA NJUNA ..... 1ST DEFENDANT

CHIEF LAND REGISTRAR MOMBASA ..... 2ND DEFENDANT

ATTORNEY GENERAL ..... 3RD DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to the Further Amended Plaint dated 29th November, 2023 instituted by Luvuno Mwamwero Mwazuma, the Plaintiff herein. The suit was against Geoffrey Maina Njuna, The Chief Land Registrar, Mombasa and The Attorney General the Defendants herein.

2. Upon service of the pleading and summons to enter appearance, the 2nd and 3rd Defendants filed their undated Memorandum of Appearance and a Statement of Defence dated 31st January, 2024. Interlocutory Judgment was entered against the 1st Defendant after he failed to enter appearance. Subsequently, being a land matter it proceeded against the 1st Defendant pursuant to the provisions of Order 10 Rules 4, 6,7,9 and 10 of the Civil Procedure Rules, 2010 respectively.

II. Description of the Parties in the suit

3. The Plaintiff was described as an adult female of sound mind and understanding. The 1st Defendant was described as a male adult person of sound mind whose last known Address for Service is P.O. Box 81620 Mombasa whilst the 2nd Defendant was described as a Public Officer in the Department of

Lands appointed under Section 13 of the *Land Registration Act* No. 3 of 2012. The 3rd Defendant was described as the Honourable Attorney General as a Representative of the Government of Kenya on behalf of the Department of Lands.

III. Court directions before the hearing

4. Nonetheless, on 9th October, 2024, the Honourable Court fixed the hearing dated on 18th November, 2024 with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing on 18th November, 2024 by way of adducing "viva voce" evidence with the Plaintiff's witnesses testifying in Court whereby they closed their case and the Defendants' by consent with the Plaintiff on 11th December, 2024 adopted documents by the 2nd and 3rd Defendants as evidence to be relied on in the case.

IV. The Plaintiff's case

5. From the filed pleadings, the Plaintiff had been in occupation of the Parcel of Land known as Mombasa/Mwembelegeza/765 (Hereinafter referred to as "The Suit Land") prior to the year 1970. On 1st December 1998 the Ministry of Lands and Settlement, through the Department of Land Adjudication and Settlement, issued the Letter of Offer to her. The Plaintiff stated further that subsequently the Chief Accountant, Settlement Fund Trustees issued the Additional Outright Purchase Charges in the sum of Kenya Shillings Two Hundred and Ninety (Kshs. 290.00/=) on 19th March, 2001, which the Plaintiff paid.

6. According to the Plaintiff, sometimes in the year 2020 the Allotment Letter was lost and/or misplaced, which matter was reported to Bamburi Police Station on 25th September 2020 vide OB NO. 08/25/9/2020. On 10thAugust 2021, the Mombasa County Lands Adjudication & Settlement wrote to the Director, Land Adjudication & Settlement, Nairobi for requisition of Discharge of Charge of the said Parcel of Land. Having made all necessary payments to the Land Adjudication & Settlement afore mentioned, the Ministry of Lands, Public Works, Housing & Urban Development, through the County Adjudication & Settlement, Mombasa, on 16th October 2023, directed the 2nd Defendant to release, Transfer and Discharge of Charge to the said Land Reference Number Mombasa/Mwembelegeza/765 to the Plaintiff herein.

7. In the forwarding letter dated 16th October, 2023 to the said 2nd Defendant the Mombasa County Settlement Officer, in the 2nd Paragraph stated that the said Parcel of Land appears to have a Title dated 30th August,1999 issued to the 1st Defendant herein. In the 3rd Paragraph of the said letter, the Officer requested the 2nd Defendant to recall the 1st Defendant's Title before issuing a new Title to the Plaintiff. On conducting due diligence and upon perusal of the Land Register for Mwembelegeza, there were no records relating to the 1st Defendant's purported Title nor was there a Green Card opened for Registration of the purported Title.

8. The 1st Defendant according to the Plaintiff was unknown to the Plaintiff, had never settled at the suit premises and had never laid any claim for the same against the Plaintiff to date. The 1st Defendant had perpetuated fraud by obtaining and/or acquiring the said Title illegally in the year 1999 and the Plaintiff contends that the same is fake and/or was acquired through misrepresentation. The Plaintiff maintains that she followed the due Process in acquiring the Suit Property and being the Original and Legal Allotee she was entitled to the Registration of LR. No. Mombasa/Mwembelegeza/765.

9. The Plaintiff prayed for Judgment to be entered against the 1st , 2nd and 3rd Defendants jointly and severally for:-

a. A Declaration that the Plaintiff is the Legal Allotee and Owner of the Suit Premises.

b. An Order Compelling the 2nd Defendant to revoke and/or cancel the 1st Defendant's Title without its production of the Original.

c. An order compelling the 2nd Defendant to Register and issue a Title to the Plaintiff pursuant to the *Land Registration Act* No. 3 of 2012.

d. Any other Relief this Honourable Court deems fit to grant.

10. The Learned Counsel for the Plaintiff Mr. Mkan made the following brief opening remarks at the commencement of the case. He stated that in the case, the Plaintiff claim was for the ownership of suit land. He submitted that she had paid all the requisite charges but she had not been issued with a title. While on the contrary, it was the 1st Defendant who had been issued with a title deed. The 1st Defendant despite of service never entered appearance.

11. The Plaintiff called her witness PW - 1 on 18th November, 2024 at 11.00am where she averred that: -

A. Examination in Chief of PW - 1 by Mr. Mkan Advocate.

12. PW - 1 was sworn and testified in Swahili language. She identified herself as LUVUNO MWAMWERO MWAZUMA, a citizen of Kenya and holder of the national identity card bearing all the particulars as indicated thereof and shown to Court prior to her commencing testimony. She was the Plaintiff and had sued the 1st, 2nd and 3rd Defendants herein. She had recorded a witness statement dated 29th November, 2023 which she wished to have adopted as her evidence in chief. Further, she had filed five (5) documents through a List of Documents dated 29th November, 2023. They were produced as the Plaintiff Exhibits numbers 1 to 5. Additionally, on 23rd February, 2024the Plaintiff filed three (3) more documents through a Supplementary List of Documents . They were produced as Plaintiff Exhibit numbers 6, 7 and 8 respectively. She told the court that she had sued the 1st Defendant because she wanted her title deed. The 1st Defendant brought her a letter and the title deed claiming to be the owner of the suit land. She lodged a complainant with the Chairman of Land Adjudication and Settlement Committee. She informed her of the title deed being held by the 1st Defendant. She never got any assistance from the said Committee and hence decided to institute this suit before this Court. She claimed having gotten the title from the Government. She had been living at Mwambelegeza all along.

13. PW - 1 told the court that she was given the Letter of Allotment dated 1st December, 1998 and she paid a sum of Kenya Shillings Two Hundred and Ninety (Kshs. 290/-) for it on 19th March, 2001. She urged the Court to grant her the title and to cancel the title supposedly being held by the 1st Defendant.

B. Cross examination of PW - 1 by M/s. Mwanaszumba Advocate.

14. PW - 1 emphasized having been given a Letter of Allotment with reference to the Special condition. She was given the Letter of Allotment on 1st December, 1998. She confirmed it had 90 days of validity from the date of offer. She paid on 19th March, 2001 and she had not brought the PDP or proof of the boundaries to Court.

C. Re - examination of PW - 1 by Mr. Mkan Advocate.

15. PW - 1 reiterated that she paid for the land – a sum of Kenya Shillings Two Hundred and Ninety (Kshs. 290/-) and she was issued with the receipt on the issue of PDP – all the documents. She had been given

all these documents by the Government. The Plaintiff stated that she was currently in occupation of the land to date.

16. The Plaintiff marked its case closed through his Counsel Mr. Mkan Advocate on 18th November, 2024.

V. The 2nd and 3rd Defendants case

17. The 2nd & 3rd Defendants responded to the Plaint through a Statement of Defence. They admitted the contents of Paragraphs *1*,*2*,*3* and *4* in so far as they were vague descriptions of the parties herein save that the address of service for the 3rd Defendants for purposes of this suit shall be care of the Honourable Attorney General, Attorney General's Chambers, NSSF Building, 9th Floor P.O. Box 82427-80100 MOMBASA.

18. The 2nd and 3rd Defendants denied the averments in Paragraphs 5 and 6 of the Plaint and the Plaintiff was invited to prove legitimate ownership of suit property MOMBASA/MWEBELEGEZA/765. The 2nd and 3rd Defendants denied the averments in paragraphs *7*, *8*, *9*, *10* and *11* and further invited the Plaintiff to prove the authenticity of documents relied upon. The Defendants herein invited the Plaintiff to prove continuous and uninterrupted occupation of the suit property as pleaded in Paragraph *12*. The 3rd Defendant denied the averments of Paragraphs *13* and *14* and the prayers made in the plaint.

19. According to the Defendants without any admission thereof they responded that:

    a. The claim herein of fraudulent transfer of suit property to the 1st Defendant in year 1999 was time barred under the *Limitation of Actions Act*, Cap. 22 and Section 6 of the *Public Authorities Limitation Act* which provided that actions founded on tort must be brought within 12 months.

    b. There was no proof that leave to file out of time had been issued.

    c. The Court had no jurisdiction to hear and determine the suit considering that time limitation of suits goes to the jurisdiction of court time.

20. The Defendants further prayed that the suit herein be dismissed as held in case of:- "Francis Munyao Mulinge & 2 others – Versus - Gladys Mponda & 5 others [2018] eKLR",

    i. Since it had been overtaken by events and has suffered laches hence it is untenable

    ii. The 2nd and 3rd Defendants averred that the suit was vexatious, abuse of court processes process.

    iii. The alleged Letter of Offer relied upon and marked as "L – 1" dated 1st December 1998 is in the name of Dazame Menza Nyamwi and no proof that the Plaintiff was one and the same person as the offeree.

    iv. The Letter Offer relied upon relates to Plot No. 764 while suit property pleaded was Plot No. 765.

    v. The Letter of Offer was valid for 90 days only during which time requisite payments were to be made failure to which offer would be cancelled with no further notice.

    vi. Payments being made in after lapse of 90 days are null and void ab initio.

    vii. In any event it was trite law that the letter offer is imposes the terms and conditions to be met in order to acquire the property failure to which the land could be re-allocated to someone else.

viii. There was no evidence that persons who issued and executed the discharge of charge were acting on behalf of the Settlement Fund Board.

21. Without any admission thereof, the 2nd and 3rd Defendants stated that the acts or omissions undertaken under this suit property were anchored in the 2nd Defendant's statutory duties under the *Land Registration Act* and the Land Registration (Gen Amendment) regulations 2023 which indemnifies them from liability. According to the 2nd and 3rd Defendants, the suit herein was time barred hence this court lacked jurisdiction to determine issues herein.

22. The Plaintiffs had failed to exhaust the internal dispute resolution processes available under the provision Section 79 (2) and Section 80 of the *Land Registration Act*. No. 3 of 2012 and the 2nd Defendant shall at the earliest raise a preliminary objection on this point of law. According to the Defendants the notice of intention to sue was not issued hence the suit herein was fatally defective and in breach of *Government Proceedings Act*.

23. The 2nd and 3rd Defendants pleaded that, the Plaintiff was not entitled to the prayers sought in the Plaintiff was not entitled to the prayers sought in the Plaint and the same must be dismissed with costs.

24. The 2nd and 3rd Defendants, M/s. Mwanazumba Advocate opened with the following remarks that their case was all about due process and procedure and was not followed by the Plaintiff i.e. of getting the Title Deed. According to the Counsel she would be demonstrating that on the contrary the 2nd and 3rd Defendants did have instructions from the 1st Defendant who had the title deed. The Counsel told the court that she had gathered the Plaintiff's had been and still was in occupation of the suit land. The Counsel stated that she was only guided by the records at the Land Registry.

25. On 11th December, 2024, the Plaintiff and Defendants called their cases to a close through their Learned Counsel Mr. Mkan and M/s. Mwanazumba respectively.

VI. Submissions

26. On 11th December, 2024 after the Plaintiff and Defendants marked the close of their cases, the Honourable Court directed that the parties file their submissions within stringent timeframe thereof on. Unfortunately, by the time of penning down the Judgement the Honourable Court had not managed to access submissions from any of the parties neither from the Judiciary CTS Portal nor ELC Registry. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 13th June, 2025 accordingly on its own merit. Eventually, it was delivered on 11th July, 2025.

VII. Analysis and Determination

27. I have keenly assessed the filed pleadings by all the Plaintiff and 2nd and 3rd Defendants herein, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

28. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) for its determination. These are: -

a. Whether the suit is time barred

b. Whether the Plaintiff had exhausted all the external dispute resolution mechanisms before filing the suit

c. Whether the Plaintiff had a claim and was entitled to the prayers sought in the Plaint

d. Who bears the costs of the suit?

Issue No. a). Whether the suit is time barred

29. Under this sub title, the Honourable Court shall examine the limitation of actions of this suit. The court will first seek to establish whether this suit is time barred by the *limitation of actions act* as was raised by the Defendant it its defence. In doing so, the court is alive to the fact that this issue might summarily determine the suit in the event that it is established that indeed the suit is time barred.

30. The Defendant stated that the claim herein of fraudulent transfer of suit property to the 1st Defendant in the year 1999 is time barred under the *Limitation of Actions Act*, Cap. 22 and Section 6 of the *Public Authorities Limitation Act*, Cap. 39 which provided that actions founded on tort must be brought within 12 months.

31. The provision of Section 3 of the *Public Authorities Limitation Act* Cap. 39 provides as follows:

> "(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.
>
> (2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.
>
> (3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of—
>
> (a) twelve months, in the case of proceedings founded on tort or;
>
> (b) three years, in the case of proceedings founded on contract, from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant."

32. From the foregoing, it is clear that actions founded on tort against the Government must be brought within 12 months of the cause of action accruing. Turning to Section 4(2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, the provision is clear that claims based on tort are to be brought within a period of three (3) years from the date on which the cause of action arose. In the present instance, the suit was founded on fraud which had taken place in 1999 when the title to the 1st Defendant was issued. According to the Plaintiff on conducting due diligence and upon perusal of the Land Register for Mwembelegeza, there were no records relating to the 1st Defendant's purported Title nor was there a Green Card opened for Registration of the purported Title. The issue that stands out for determination therefore is whether the Plaintiff's suit is time barred.

33. The 2nd and 3rd Defendants are protected under Article 156 of *the Constitution*, 2010. The provisions of Section 3(1) of the *Public Authorities Limitation Act* is clear on the limitation of proceedings against the Government or a local authority and provides that; -

> "No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."

34. The Land was allegedly fraudulent registered in the 1st Defendant's name in the year 1999, the Plaintiff filed her suit on 29th November, 2023, which was a period of 24 years. Section 3 of the *Public Authorities Limitation Act* provides for a period of 12 months after the cause of action accrued, to file suit against the Government or a local authority. The filing of the current suit 24 years later was clearly in contravention of the provisions of the law and the Plaintiff's suit was therefore time barred.

35. A reading of the Plaint instituted by the Plaintiff shows that she had premised her claim on the tort of fraud. The Plaintiff pleaded that the 1st Defendant had perpetuated fraud by obtaining and/or acquiring the said Title illegally in the year 1999 and the Plaintiff contends that the same is fake and/or was acquired through misrepresentation. Simply put, the Plaintiff's claim, which was anchored on a tort of fraud, illegality and misrepresentation committed by the 1st Defendants, is time barred by dint of the provision Section 3(1) of the *Public Authorities Limitation Act*.

36. It is also important to establish the link between the *Public Authorities Limitation Act* and the *Limitation of Actions Act*. In this regard, Section 6 of the *Public Authorities Limitation Act* provides for Application of the *Limitation of Actions Act*, Cap. 22 in matters governed by the Act and provides as follows: -

> " Notwithstanding the provisions of Section 31 of the *Limitation of Actions Act*, section 22 of that Act shall not apply in respect of the provisions of this Act; and in section 27 of the *Limitation of Actions Act* the reference to section 4(2) of that Act shall be read and construed as a reference to section 3(1) of this Act, but subject thereto and notwithstanding section 42 of the *Limitation of Actions Act*, Part III of that Act shall apply to this Act."

37. The provision of Section 4(2) of the *Limitation of Actions Act*, Cap. 22 provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. In accordance with Section 6 of the *Public Authorities Limitation Act* cited herein above, reference to Section 4(2) of the *Limitation of Actions Act* meant reference to Section 3(1) of the *Public Authorities Limitation Act* which provides that actions founded on tort must be brought within 12 months. The import of this provision is that the Plaintiff's claim herein is statute barred by slightly over 24 years.

38. In case of: "Gathoni – Versus - Kenya Co - operative Creameries Limited [1982] 104 at p 107" the court had held as follows: -

> "…….The law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the Applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done."

39. The Court of Appeal in case: "Mukuru Munge – Versus - Florence Shingi Mwawana & 2 others [2016] eKLR" held that: -

> " The purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial

when all the evidence is available and to ensure that justice is not delayed. In our minds, those are important constitutional values and principles, which are underpinned by legislation on limitation of actions."

40. The Plaintiff needed to commence his claim within the time prescribed under provision Section 4(2) of the *Limitation of Actions Act* (which meant reference to Section 3(1) of the *Public Authorities Limitation Act*.) It follows therefore that by the time the Plaintiff filed this suit, his claim was already statute barred. In the case of "Bosire Ongero – Versus - Royal Media Services [2015] eKLR" the court had held that the issue of limitation went to the jurisdiction of the court to entertain claims and therefore if a matter was statute barred the court had no jurisdiction to entertain the same. Therefore the Plaintiff's claim against the 2nd and 3rd Defendants was hereby struck out.

Issue No. b). Whether the Plaintiff had exhausted all the external dispute resolution mechanisms before filing the suit.

41. Under this sub - title, the Honourable Court shall examine the issue of the Doctrine of Exhaustion. This doctrine in Kenya traces its origin from Article 159(2)(c) of *the Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution. In that constitutional spirit, laws have been developed to guide how such mechanisms are to be achieved. Likewise, Courts have developed jurisprudence in support of the position that Courts must be the final arbiter in instances where alternative dispute resolution avenues are provided for in law. As said earlier, one such avenue is the doctrine of exhaustion.

42. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in case:- "Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others – Versus - Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR". The Court stated as follows: -

> " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R – Versus - Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:
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> This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly – Versus - Karume [1992] KLR 21 in the following oft-repeated words:
>
> Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
>
> While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and

basis for the doctrine. This is Geoffrey Muthiga Kabiru & 2 others – Versus - Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:

> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

43. Are there exceptions to the doctrine of exhaustion of remedies? This question was aptly discussed in the case of "R. – Versus - Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra)", where the Court stated as follows: -

> " What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important Constitutional value is at stake."

44. Flowing from the above, the Court finds that the gist of the Plaintiff's case as glaring around allegations of obtaining land by fraud by the 1st Defendant. In this instant case, I find this Honourable Court competent enough to determine this said suit to its completion.

Issue No. C). Whether the Plaintiff is entitled to the orders sought in the Plaint

45. Under this Sub - heading, the Court shall examine whether the Plaintiff is entitled to the prayers sought at the foot of the Plaint. Although the suit was undefended, the Plaintiff has a duty to formally prove their case on a balance of probabilities as is required by law. In the case of "Kirugi and Another – Versus - Kabiya & 3 Others (1987) KLR 347", the Court of Appeal held that; -

> " The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard."

46. Similarly, in the case of "Gichinga Kibutha – Versus - Caroline Nduku (2018) eKLR", the Court held that; -

> " It is not automatic that (in) instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest."

47. The Plaintiff prayed to be declared the legal allotee and owner of the suit property. The procedure for issuance of a certificate of lease arising from a letter of allotment were espoused in the case of "Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane), suing on behalf of the Estate of Mohamed Haji Dagane) – Versus - Hakar Abshir & 3 others [2021] eKLR" thus:-

> " The question of acquisition behooves the court to trace the legal prescriptions for the issuance of an allotment letter and to adjudge the Plaintiff's acquisition from the light of the law.
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> This court in the case of Mako Abdi Dolal – Versus - Ali Duane & 2 others [2019] eKLR noted that prior to the promulgation of the 2010 Constitution and the 2012 amendments to the body of Land Laws in Kenya, disposition of government land was governed by the Government Lands Act (Repealed). Section 4 of the Act provided as follows:
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> "All conveyances, leases and licenses of or for the occupation of Government Lands, and all proceedings, notices and documents made, taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act."
>
> Power to dispose of public land was vested in two entities: The President and the Commissioner of Lands, under Sections 3 and 9 respectively. The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See Harison Mwangi Nyota – Versus - Naivasha Municipal Council & 20 others [2019] eKLR.
>
> "..... The question that the Plaintiff seemed to raise is what role the Municipal Council of Naivasha had in the issuance of allotment letters to the Defendants in 1992. According to DW1, an employee of the 1st Defendant, the local authority (1st Defendant) has to recommend that the land is available for allocation before an allotment letter can issue. DW - 13 also told the court that the Council oversees all developments in its jurisdiction and allocates land on advisory basis for the Commissioner. It seems that even if the 1st Defendant issued the letters dated 1/12/1992, it was mere advisory to the Commissioner of Lands. The allotment of the land had to be ratified by the Commissioner for Lands. It is obvious even from the communication between the Municipal Council and the Office of the Commissioner of Lands that the Council played an important role in identifying what land was available for purposes of alienation."
>
> The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. See Nelson Kazungu Chai & 9 Others – Versus - Pwani University College (2014) eKLR
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> "It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee."

The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under Section 11 of the Government Lands Act (Repealed). The matters to be determined include the upset price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.

The fourth step would be for the gazettement of the plots to be sold, at least four weeks prior to the sale of the plots by auction under Section 13 of the Government Lands Act (Repealed). The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.

The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the Government Lands Act (Repealed).

The sixth step would be for the issuance of an allotment letter to the allotee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: Gladys Wanjiru Ngacha – Versus - Teresa Chepsaat & 4 others 182/1992 (Nyeri); and in Dr. Joseph N.K. Arap Ng'ok – Versus - Justice Moijo Ole Keiyua & 4 others C.A.60/1997 where the Court of Appeal held as follows:

"It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land."

In order for an allotment letter to become operative, the allotee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. See the decision in: Mbau Saw Mills Ltd – Versus - Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014] eKLR

"I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the Plaintiff were a nullity in law."

The allotment letter also must have attached to it a part development plan (PDP). See the decision in African Line Transport Co. Ltd – Versus - The Hon AG, Mombasa HCCC No. 276 of 2013 where Njagi J held as follows:

"... Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number."

And again, in Nelson Kazungu Chai & 9 Others – Versus - Pwani University College (2014) eKLR

"Worth noting as well is that no Part Development Plan was produced to back the Appellants' claim that due process had been followed as alleged."

The seventh step, which comes after the allotee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease. Nelson Kazungu Chai & 9 Others – Versus - Pwani University College (2014) eKLR the court held as follows:

"It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of African Line Transport Co. Limited -Versus - The Hon AG, Mombasa HCCC No.276 of 2013 where Njagi J held as follows:

"Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot."

Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline. It would also help a litigant's case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate.

Now, in the present case, the court confirms that the Plaintiff did indeed file a letter of allotment dated 7th April 1994 and Referenced 111303/VIII. The allotment letter was issued by the Commissioner of lands as it bears his signature. The problem though is that the allotment letter was issued to one Mohamed Shagana and not the deceased Mohamed Haji Dagane. The Plaintiff has however provided an affidavit sworn by the said Mohamed Haji Dagane on 18th April 2008 averring that his name had been misspelt in the allotment letter and that he had already written to the Commissioner of Lands for a rectification of the same. The court would have no reason to disprove the Plaintiff's averment, save that the problem seems to rear its head again. The same is discussed later.

The filed allotment letter does indeed have a part development plan attached, satisfying the second condition.

On the third condition however, a letter drawn by the deceased, Mohamed Haji Dagane on 19th November 2008 and received on the following day, 20th November 2008 throws a spanner into the works. In the letter, the deceased admits that he did not comply with the conditions set out in the allotment letter, specifically that he did not pay the stand premium and ground rent on account of his ill health. Now, the allotment letter referred to, the one issued 7th April 1994 required the payment of a stand premium of Four Thousand Six Hundred (Kshs. 4,600) and other payments amounting to Two Thousand Nine Hundred and Fifty (Kshs. 2,950) all in total amounting to Seven Thousand, Five Hundred and Fifty Shillings (Kshs.7,550). Clause 2 of the allotment letter required the payment of the amount via banker's cheque within 30 days. Thus, the offer was only open up to 30 days after 7th April 1994, meaning sometimes in early May 1994. Clearly, when the deceased was unable to pay the requisite fees by that day, the offer lapsed. See Rukaya Ali Mohamed – Versus - David Gikonyo Nambachia & another Kisumu HCCA. 9/2004 where Warsame J held that:

"once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest".

In the present case, upon lapse of the offer contained in the allotment letter, the land was free to be allotted to someone else. It appears that this is what happened because the letter drawn by the deceased, dated 19th November 2008 was one requesting the Commissioner of Lands to re-allocate the Suit Property to the deceased. Note that in this letter, the deceased signs off as Mohamed Shagana. This little fact makes the court question the earlier affidavit supposedly to the effect that Mohamed Shagana, to whom the allotment letter was issued, is one and the same person as the deceased, Mohamed Haji Dagane. Why would the deceased, who vide the affidavit of 18th April 2008 averred that he had already written to the Commissioner of Lands to rectify his misspelt name on the allotment letter, in November 2008 sign off as Mohamed Shagana?

Be that as it may, the Commissioner of Lands did reply to the letter drawn by Mohammed Shagana, curiously on the very next day, being 20th November 2008 acknowledging receipt of the request and promising to communicate on the issue at a later date. It would appear that that date never came, and no allotment letter was issued to the deceased in 2008 or thereafter. As demonstrated, by this time, Mohammed Shagana did not hold interest in the Suit Property, the offer having lapsed in May of 1994.

On the premises, the beacon certificate issued to the deceased on 15th December 2005 is a sham and was issued illegally. On the whole, the Plaintiff has failed to satisfy the Court that the Suit Property forms part of the estate of the deceased and as such, the orders sought by the Plaintiff cannot be granted."

48. The Court of Appeal in the case of "Munyu Maina – Versus - Hiram Gathiha Maina [2013] eKLR", held as follows: -

> " 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."

49. The provision of Section 80 (1) of the *Land Registration Act*, No. 3 of 2012 provides that:-

> " Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake."

50. From the above provisions, it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

51. One acquires land when one obtains a title to it an allotment letter does not confer a right of ownership. It is the title deed that does - See the Supreme Court decision in "Torino Enterprises Limited – Versus - Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)": -

> " So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In Dr. Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others *CA 60/1997* [unreported]; and in Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:
>
> "It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all" [Emphasis added].

59. The pronouncement in Gladys Wanjiru and Dr Joseph NK Arap Ng'ok (supra) has been echoed in various Environment and Land Court decisions post the 2010 Constitution, including; Lilian Wanjeri Njatha – Versus - Sabina Wanjiru Kuguru & another, Environment and Land Case No 471 of 2010; [2022] eKLR; John Elias Kirimi – Versus - Martin Maina Nderitu & 4 others, Environment and Land Suit No 320 of 2011; [2021] eKLR; and Kadzoyo Chombo Mwero – Versus - Ahmed Muhammed Osman & 11 others, Environment and Land Case No 42 of 2021; [2021] eKLR, to mention but a few.

60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter. In Peter Wariire Kanyiri – Versus -

Chrispus Washumbe & 2 others, Environment and Land Court Case No 603 of 2017; [2022] eKLR, Kemei, J held as follows:

> [15]. In the case at hand, in the absence of any title registered in the name of the plaintiff, the court is unable to hold that the plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences" [Emphasis added]."

52. The only prove of ownership that the Plaintiff produced was a letter of Allotment. The Court has noted that not only is it in the name of a third party who is not a party to this suit but also bears stringent and time – bound pre – Conditions overleaf which the Plaintiff failed to fulfil. . She had not explained to the Court how she got to be the allottee being that the officer letter shows one Dzame as the allottee. Indeed, the Plaintiff acknowledges that the title deed has been issued to the 1st Defendant albeit on allegation it was vide fraudulent means. It is this Court's finding that the Plaintiff has failed to prove how she became allocated the suit property. According to the provision of Sections 3 (1) of Laws of Contract, Cap. 23 and Section 38 (1) of *Land Act*, No. 6 of 2012 the dispositions in land must be in writing so much so that it is the duty of the Plaintiff to prove proprietary rights by way of documentary evidence. It is the view of the Court that he failed to discharge this duty. On the 1st prayer by the Plaintiff, the Plaintiff fails as she failed to prove her ownership by allotment.

53. On the prayers as against the 2nd Defendant, the same cannot stick as the Court earlier in this Judgment struck out the case of the Plaintiff as against the 2nd and 3rd Defendant. In the premises the Plaintiff has not proved that she is entitled to any of the prayers sought at the foot of the Plaint.

Issue No. d). Who bears the costs of the suit

54. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the *Civil Procedure Act* Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

55. In "Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR" quoted the case of "Levben Products – Versus -Alexander Films (SA) (PTY) Limited 1957 (4) SA 225 (SR) at 227" the Court held:-

> "It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp – Versus - Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

56. In the present case, I reiterate that the Plaintiff has not proved her claim against the 2nd & 3rd Defendants; being that the 1st Defendant never participated in the case shall not have costs and the 2nd and 3rd Defendant shall have the costs to be paid by the Plaintiff.

VIII. Conclusion and Disposition

57. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiff has not established his case against the Defendants. Thus, the Court proceeds to make the following specific orders:

    a. That Judgment be and is hereby entered in favour of the Defendants as the Plaintiff has failed to prove her case as per the Plaint dated 29th November, 2023.

    b. That Plaintiff's case against the 2nd and 3rd Defendants be and is hereby struck out for being barred by the *Limitation of Actions Act* and the *Public Authorities Limitation Act*.

    c. That there shall be no award of compensation for forceful detainer as the same is a criminal offence which the Court has no jurisdiction to try.

    d. That the costs be awarded to the 2nd and 3rd Defendants jointly and severally to be borne by the Plaintiffs. The 1st Defendant did not participate in the proceedings therefore there shall be no orders to him.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 11TH DAY OF JULY 2025.

.....

HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT

AT MOMBASA

Judgement delivered in the presence of: -

M/s. Firdaus Mbula – the Court Assistant.

Mr. Mkan Advocate for the Plaintiff.

No appearance for the Defendant.