



**Macharia & another v Opara (Environment and Land Case 6 of 2019)
[2025] KEELC 6112 (KLR) (17 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE 6 OF 2019
CK NZILI, J
SEPTEMBER 17, 2025**

BETWEEN

ISAAC MACHARIA 1ST PLAINTIFF

JAMES WANYOIKE 2ND PLAINTIFF

AND

CLEOPHAS BARASA WANJALA OPARA DEFENDANT

JUDGMENT

1. The plaintiffs came to this court through a plaint dated 4/1/2019 seeking:
 - (a) Eviction of the defendant, agents, servants, or employees from Land Title No. Kitale Municipality Block 8/73, hereinafter the suit land.
 - (b) Permanent injunction barring and restraining the defendant, his agents, servants, or employees from entering onto, trespassing in, leasing, selling, dealing, putting up structures, and or in any way whatsoever interfering with the plaintiffs' ownership or interest in Land Title No. Kitale Municipality Block 8/73 herein.
2. The plaintiffs averred that they are joint registered owners of the suit land measuring approximately 0.9455 Ha, after they had successfully applied for allocation and payment of the requisite fees.
3. Further, the plaintiffs averred that on or about September 2016, the defendant, without any colour of right or justification, forcefully invaded the suit land, erected structures therein, and has since been staying on the land, hence interfering with their right to ownership, possession, and use.
4. The defendant opposed the suit through a statement of defence and counterclaim dated 26/2/2019, while admitting that the plaintiffs were the registered joint owners of the suit land, he termed the same as fraudulent. The defendant averred that the land was initially, on 1/6/1991, allocated and possessed through a lease to Jason Oyamo Oimba, which he and Jane Nasimiyu Aimba sold to the defendant



- and one David Juma Simiyu on 21/8/1997, and they have been in possession to date. The defendant thus denied invading the suit land as alleged or at all, or unlawfully or without justification, erecting structures on it in 2016; otherwise, he was a bona fide purchaser with the right to occupy and possess the same.
5. The defendant averred that the alleged issuance of title to the suit land was not only fraudulent but was also done while the plaintiffs were aware that he was in occupation of the land, yet it was not available for allocation, in view of the existing lease. The defendant averred that the 2nd plaintiff had instituted criminal proceedings against him for malicious damage and trespass, that was still pending before the court.
 6. By way of a counterclaim, the defendant averred that the title held by the plaintiffs should be cancelled, the register rectified, and a new one issued in their names with David Juma Simiyu as bona fide purchaser. The defendant prayed for:-
 - (a) Declaration that he was a bona fide purchaser of title for parcel Kitale Municipality Block 8/73.
 - (b) Cancellation of Title No. Kitale Municipality Block 8/73, rectification of the title, and a new one be issued to him and his partner.
 7. By a reply to the defence and defence to the counterclaim dated 22/3/2019, the plaintiffs term the acquisition of title to the suit land as lawful. The plaintiffs denied the alleged initial allocation of the suit land to Jason Oyamo Aimba on 18/4/1986, by the defunct Commissioner of Lands. The plaintiff termed the prayers sought in the counterclaim as legally untenable.
 8. At the trial, Isaack Macharia testified as PW1. He relied on a witness statement dated 4/1/2018 as his evidence-in-chief. PW1 told the court that he, together with the 2nd plaintiff became the joint registered owners of the suit land after successfully applying for the land, obtaining a letter of allotment dated 5/12/1995, lease, acceptance letter dated 26/11/2013, payment of the requisite fees vide receipt No. 3449053 dated 20/2/2013, reply of letter from National Land Commission to obtain an amended RIM, payment of fees vide receipt No. 4065304 dated 9/1/2014 from the Ag. Director of Surveys, receipt of confirmation letter dated October 2014 from the Director of Surveys, issuance and registration of a lease, and payment of rates clearance up to 31/12/2007. PW1 produced the documents as P. Exhibits No. 1, 2, 3, 4, PMFI-(5), 6, PMFI-(7), 8, and 9(1), respectively.
 9. PW1 told the court that they have and have been able to use the land since November 2016, some people invaded and demolished the house that they had erected on the land, whose iron sheets they traced with the defendant, reported the matter to the police after which a Criminal Case No. 2059/2017 was preferred against the defendant but was later acquitted for lack of evidence.
 10. PW1 said that they were not privy to any alleged sale, nor was the lands office aware of any pre-existing commitment on the land by the defendant to anyone; otherwise, the suit land was initially vacant. PW1 denied that there was any fraud in the manner of acquiring title to the suit land. Equally, PW1 said that the defendant allegedly entered the land between 20/3/2014; otherwise, he was known to the 2nd plaintiff. Though the allocation took place in 1995, PW1 said that they made payments in 2013, after writing an acceptance letter.
 11. Further, PW1 said that the file registers were missing, hence the reason why they had to write a letter to the National Land Commission, after establishing who had received the fees on 20/12/2013. PW1 said that by the time the lease was attested on 18/12/2015, no one was occupying the suit land. PW1 said the DMFI Nos. (1) and (2) were issued on 18/4/1986 in favour of Jason Aimba with effect from 1/6/1991, while theirs was with effect from 1/12/1995. PW1 denied knowledge of DMF-1 No. (3), a



- sale agreement dated 21/8/1997, showing that the defendant bought the suit land from Jason Aimba and Jane Nasimiyu; otherwise, it referred to a different plot.
12. PW1 denied knowledge of a previous allottee of the land or occupation of the same by the defendant by the time that they acquired title to the land. PW1 said that they filed the suit after attempts to engage the defendant to cease acts of encroachment failed. PW1 said that as of 1/12/1995, there was no one occupying or having structures on the suit land. PW1 said that after the allocation, they fenced off the land by constructing a perimeter fence, using barbed wire, as well as erecting a farmhouse in 2010. PW1 told the court that it was only in 2012 that the defendant's structure came up at the far end of the plot and made a report to the police.
 13. Similarly, PW1 stated that they took time to make payments until 2013, since there was a disorganization in the lands office, until the National Land Commission was established. PW1 said that the certificate of lease was issued and registered on 18/12/2015. PW1 said that the letter of allotment dated 18/4/1986, was for an unsurveyed residential plot. Equally, PW1 said that the lease dated 1/6/1991, neither talked of a date for registration, nor was it attested to at the back or signed by the Land Registrar. PW1 said that the said lease was neither registered nor indicated whether any stamp duty was paid for it.
 14. According to PW1, the defendant had not filed any document from the Director of Surveys communicating of any amendment to the RIM. Equally, PW1 pointed out anomalies in the annual rent, figures for the same date, and the variations to the acreage of the land going by DMFI Nos. 1, 2, and 3. PW1 said that the sale agreement displayed by the defendant was for L.R No. 2116/7101 measuring 0.7455 Ha, which was different from the one in the lease, DMFI-(2), and the acreage in the allotment letter to the said Jason Aimba.
 15. PW1 equally pointed out errors in the letter dated 15/8/2016, as regards the parcel number. As to DMFI No. (5) dated 30/9/2016 from the lands office, PW1 said that the author had not attached any supporting documents to show that all the legal processes of allocation, registration, and transfer had been undertaken in favour of Jason Aimba.
 16. PW1 said that the certificate of confirmation of grant in Nairobi HC Succession Cause No. 85 of 1998 was not proof of ownership of the suit land by the estate of Jason. PW1 admitted that Criminal Case No. 2059 of 2017 could not and did not determine who owns the suit land.
 17. James Gichuhi Wanyoike testified as PW2. He relied on a written statement dated 4/1/2019 as his evidence-in-chief. DW2 associated his evidence with that of PW1, save to add that he approached the defendant when he alleged that he had erected a structure on their land.
 18. Protus Mundi testified as PW3. As the County Land Surveyor, Trans Nzoia, he told the court that all surveyed land must be entered into a survey plan and the Registry Index Map. According to him, Title No. Kitale Municipality Block 8/73 was a conversion number. PW3 said that the survey comes first. He said that, once a survey plan for a title issued under the Registration of Titles Act, when a conversion occurs to the Registered Land Act, the RIM has to be amended, since the Registered Land Act follows the RIM registration.
 19. PW3 told the court that there was a conversion table regarding the two parcels of land and L.R No. 2116/7101. He said that Kitale Municipality Block 8/73 was a new parcel lying on a created block of land, hence it was not in the conversion list shown DMFI No. (5). PW3 said that the letter was from the Ministry of Lands and Physical Planning.
 20. According to PW3, if Jason Aimba was allocated the plot when it was still an unsurveyed residential plot, it could not have had a Land Reference Number, which ideally is a survey number.



21. Equally, PW3 said that L.R No. 2116/7101 was missing in their survey records. PW3 produced the conversion table as P. Exhibit No. (10). PW3 said that the RIM was drawn or amended on 31/5/1996. PW3 said that a conversion table shows a conversion of land reference numbers to parcel numbers. In this case, PW3 said that Kitale Municipality Block 8/83 was never subject to conversion, since it was a new parcel number. PW3 said that L.R No. 2116/7101 does not exist in the conversion table and in the RIM for it, which was created under the Land Registration Act, 2012, following its allocation in and its survey map registration on 29/9/1998.
22. Regarding P. Exhibit Nos. 2, 4, and 5, PW3 termed the documents as regularly issued, though the plaintiffs had initially been issued with an allotment letter under the repealed Registration of Titles Act. PW3 termed DMFI No. (5) as not only misleading, erroneous, but also as an unsurveyed residential plot was capable of possessing a land reference number. PW3 said that from P. Exhibit No. (10) The Registered Land Act on the conversion table was No. 54; otherwise, its Block No. 8/73 was never converted.
23. Cleopas Barasa Wanjala Opara testified as DW1. He relied on a witness statement dated 26/2/2019 as his evidence-in-chief. His testimony was that in 1997, he, together with Daniel Juma Simiyu, bought an unsurveyed plot No. 2116/7101 measuring 0.7455 Ha from Jason and Jane Aima on 21/8/1997, took vacant possession to date. DW1 states that the seller died before the transfer and or its completion.
24. DW1 said that around August 2016, the plot was invaded by some people claiming ownership, cutting down the fence and plants, to which they wrote to the lands office for inquiries vide a letter dated 15/8/2016, and received a response dated 30/9/2016, confirming that the late Jason Aimba was the initial allottee, though a title deed had been issued to the plaintiffs.
25. DW1 said that shortly after that, he was arrested for trespass and malicious damage to property and charged in Kitale CMC Criminal Case No. 2059 of 2017. DW1 said that the plaintiffs became the registered owner when they knew it was he who was in occupation of the land which had been allocated to the late Jason Aimba by the Commissioner of Lands through an allotment letter dated 18/4/1986, following which he obtained a lease dated 1/6/1991. He insisted that the plaintiffs' title deed should be cancelled and the land reverted to him and his co-purchaser.
26. DW1 relied on the letter of allotment dated 8/4/1986, 6/6/1991 as DMFI-1(a) and (b), lease as D. Exhibit (3), sale agreement as D. Exhibit No. (3), judgment in Kitale CMC Criminal Case No. 2059/2017 as D. Exhibit No. (7), letter from the Lands Office to the Director of Surveys dated 30/5/1996 as D. Exhibit No. (8), letter from the Commissioner of Lands dated 31/3/1996 enclosing the amended RIM, as D. Exhibit No. (9), beacon certificate as D. Exhibit No. (10), receipt for Kshs. 42,488/= as D. Exhibit No. (11), sketch map dated 6/6/1992 as DMFI-(12), letter dated 11/12/1996 and 31/5/2022 as D. Exhibit No (13) and (14), demand note for rent dated 9/6/2006 as D. Exhibit No. (15), payment made on 26/5/1987 by the initial allottee as D. Exhibit No. (16), rent demand by the Commissioner of Lands for Kshs. 85,070/= as D. Exhibit No. (17), letters of administration in favour of Jane Aimba in 1997 as D. Exhibit No. (17), letter of administration issued to Tom Aaron Aimba in Kitale HC Succession No 43/2020 as D. Exhibit No. (18).
27. DW1 termed the certificate of lease (P. Exhibit No. 1), allotment letter (P. Exhibit No. 2), acceptance letter, and bankers' cheque, payment receipt P. Exhibit Nos. (3) and (4) as fraudulent, coming later than that of the initial allottee, and subject to cancellation by the court.
28. DW1 told the court that the letter dated 6/6/1991 cancelled the one dated 18/4/1986, though no letter from the Commissioner of Lands confirmed that fact. Equally, DW1 admitted that the letter dated 6/6/1991 had cancellation by hand on its face with no counter signature by the author. Further, DW1



- admitted that DMFI-1(a) and (b) have two different reference numbers, standard premiums, and land sizes.
29. DW1 admitted that the allotment letter referenced an unsurveyed residential plot, different from what is referred to in P. Exhibit No. (8) and the lease. Equally, DW1 said that DMFI-1(a) and (b) had no PDP attached to them. Further, DW1 acknowledged that he had no acceptance letter from the initial allottee.
 30. Additionally, DW1 admitted that D. Exhibits No. (2) did not tally with DMFI No. 1(a) and (b), in terms of the particulars of the plot and land size. Moreover, DW1 said that the annual rent captured on DMFI No. (1) and (b) were different from the standard premium shown in D. Exhibit No. (2), nor does the lease indicate whether the plot was registered or not.
 31. DW1 admitted also that the lease D. Exhibit No. (2) had neither attestation nor franking stamp signature by the Land Registrar, as well as on the forwarding letter to the Land Registrar. As regards D. Exhibit No. (3), DW1 admitted that its plot number and size were different from those shown in DMFI No. 1(a) and (b), as opposed to the one in the lease.
 32. DW1 admitted that DMFI Nos. (4) and (5) dated 15/8/2016 and 30/9/2016, had no green card and an official search certificate to show that the late Jason Aimba had been registered as the owner of the land. Equally, DW1 admitted that D. Exhibit No. (6) did not include the suit land as belonging to the estate of Jason Aimba. DW1 admitted that the beacon certificate had a plot or parcel number.
 33. As regards D. Exhibit No. (11) as compared to DMFI No. 1(a) and (b), DW1 said that the offer letter dated 6/6/1991 was to expire after 30 days, hence payments made on 22/3/1996 were 5 years after the expiry, and that the premium payable in the three documents was different. Regarding the RIM (DMFI No. (12), DW1 admitted that it referred to a different parcel number and plot size, compared to D. Exhibit No. (2) and D. Exhibit No. (14), DMFI Nos. 1(a) and (b) and (13). Regarding the anomalies or discrepancies pointed out in cross-examination, DW1, in re-examination, admitted that the plot allocated to Jason Aimba was initially unsurveyed, until 1996, as per D. Exhibit Nos. (3) and (11).
 34. David Juma Simiyu testified as DW2. He relied on a witness statement dated 26/2/2019 as his evidence-in-chief. DW2 confirmed the contents of the evidence of DW1 to the extent that he is the one who has been on the land with effect from 1998, after both of them bought the land as per D. Exhibit No. (3), where they have been planting maize. Again, DW2 said that the seller did not sign any transfer documents in their favour nor take them to the land control board meeting for a land control board consent. DW2 said that they had no title deed for either L.R No. 2116/7101 or Block 8/73, issued in the name of the seller or themselves.
 35. Tom Aaron Aimba testified as DW3. He relied on a witness statement dated 26/7/2019 as his evidence-in-chief. He confirmed that he was the son of the late Jason and Jane Aimba, and the legal representative of the estate as per D. Exhibit No. (18). DW3 told the court that his late father acquired the plot as per D. Exhibit No. 1(a) and (b), which he sold to the defendants as per D. Exhibit. No. (3). DW3 said that his late father had followed all the processes of allocation as per a letter dated 30/9/2016. He admitted that D. Exhibit.No. 1(a) and (b) had no plot number. Equally, he admitted that DMFI No. (5) had a different parcel number compared to D. Exhibit. No. 1(a) and (b).
 36. DW3 said that though his late father processed a title for the land, he had no copy before the court, for L.R. No. 2116/7101, which his father obtained before he passed on in 1998. DW3 admitted that he had nothing to connect L.R. No. 2116/7101 with Block 8/73.
 37. Oiro Owino Luke testified as DW4. He told the court that he had three maps for Kitale Municipality Block 8/73. The first RIM quotes plan number FR No. 239/49, which was superseded by FR No.



- 283/19; thus, there were amendments to the RIM. DW4 told the court that parcel No. 73 appears in the three maps. PW4 said that the parcel number was a result of a survey letter received on 17/6/2012. He said that the first one, dated 29/4/1998, was superseded by the letter aforementioned.
38. Therefore, DW4 said that the third map captures all the amendments done so far, and was the final RIM used to produce the titles. DW4 said that it shows an entry for plot No. 73 made on 31/5/1996, measuring 0.7455 Ha as captured in FR No. 239/49. He produced the maps as D. Exhibit. No. 12(a), (b), and (c).
39. As regards the conversion table produced as P. Exhibit No. (10), DW4 said that L.R. No. 2116/7101 was not among those converted; otherwise, parcel No. 73 came from the amalgamation of LR No. 2116/1887 and 2116/1286, as shown in the new map. The witness was stood down to bring more information regarding amalgamation and conversion.
40. The record shows that on 16/1/2025, parties took directions for the matter to proceed from where it had stopped with the former court. DW4, after his recall, told the court that the RIM for Kitale Municipality Block 8, had an entry No. 5 showing that on 31/5/1996 (D. Exhibit. No. 12(b) showed the creation of parcel No. 73, said that by a letter dated 30/12/2013 addressed to the Director of Surveys by the National Land Commission, an amendment of the RIM was registered, referring to an allotment letter and a copy of a FR No. 283/19.
41. DW4 said that the conversion table, P. Exhibit. No. (10) dated 27/3/1992 did not capture LR No. 2116/7101; otherwise, there were only 54 parcels of land. DW4 said that after 27/3/1992, there was no need for any further conversion. DW4 said that his office only gives survey or land reference numbers and not plot numbers, as indicated by DMFI No. (5), which are ordinarily allocated by surveyors before they present their report to his office.
42. DW4 said that in this case, the subject land changed from a land reference number to Kitale Municipality Block 8 on 31/5/1996, and in this case, Parcel No. 73 came up during the implementation of the new system, hence it was a new number. DW4 said that with respect to the defendants, DMFI No. (12) is what the surveyor submitted.
43. After the close of the defence case, the parties filed written submissions. The plaintiffs rely on written submissions dated 27/6/2025. It is submitted that they have discharged their burden placed on them by Sections 107 and 109 of the *Evidence Act* on how they acquired the plot through a proper paper trail, as captured in P. Exhibits. No. 1 – 9, as the statutory and administrative requirements for lawful ownership, which title has not been challenged under Section 26(1) of the *Land Registration Act*. Reliance is placed on *Torino Enterprises Ltd -vs- Attorney General & Others* (2023) KESC 79 [KLR] (22nd September 2023) (Judgment), and *Virjay Morjaria -vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR.
44. The plaintiff submitted that the counterclaim by the defendant is fatally defective as it offends Order 7 Rule 3 of the Civil Procedure Rules. Reliance is placed on *William Koross -vs- Hezekiah Kiptoo & Others*, CA No. 223 of 2023, as captured in *Kitale ELC No. 42 of 2022 Christine Kigen Serem & Others -vs- Michael Kimutai Ndiwa*.
45. Further, the plaintiffs submitted that mere occupation for a period and the erection of structures on the suit land by the defendants without permission or right amounts to a tort of trespass.
46. The plaintiffs submitted that the defendants' justification for the alleged purchase is not supported by credible documents in view of the discrepancies, anomalies, variations, and differences in defence exhibits regarding reference numbers, standard premium, plot size, total amount payable, plot identification, and a missing PDP.



47. The plaintiffs submitted that the said anomalies go to the core of the defendants' claim, undermining their authenticity and evidentiary value. The plaintiffs submitted that the failure to call witnesses from the National Land Commission to verify the alleged letters of allotment, establish their original legitimacy, or connection with Kitale Municipality Block 8/73, makes the defence collapse under the weight of its own inconsistencies and lack of proof.
48. The plaintiffs submitted that, as held in *Torino Enterprises Ltd -vs- Attorney General (supra)*, an allotment letter confers no ownership until it is perfected. In this case, the alleged allottee did not have valid letters of allotment, nor did they perfect their terms and conditions on time, to acquire a valid interest capable of being transferred, as held in *Mitu Bell Welfare Society -vs- Kenya Airports Authority & Others [2021] eKLR*, *Dr. Joseph Arap Ngok -vs- Justice Moiijo Ole Keiwua & Others, CA No. 60 of 1997*, *Gladys Wanjiru Ngacha -vs- Teresa Chepsaat & Others [2008] eKLR*, *Lillian Wanjeri Njatha -vs- Sabina Wanjiru Kuguru Another [2022] eKLR*, *John Elias Kirimi -vs- Martin Maina Nderitu & Others [2021] eKLR* and *Kadzoyo Chombo Mwero -vs- Ahmed Muhammed Osman & Others [2021] eKLR*.
49. The plaintiffs submitted that the lease and sale agreement produced as D. Exhibits. No. (2) and (3) had serious anomalies or inconsistencies as compared to D. Exhibit No. 1(a) and (b), capable of conferring any transferable title or interest in favour of the defendants from the late Jason Aimba. Reliance was placed on *Peter Wariire Kanyiri -vs- Chrispus Washumbe & Others [2022] eKLR* and *Charles Kariuki T/A Riverside Lodge & Rooms vs Rosemary Wanjiru Muthee [2006] eKLR*.
50. The plaintiffs submitted that D. Exhibits. No. 4 - 6 had no probative or evidential value; their authors were not called to testify or produce them, they had material inconsistencies or errors, the originals were not produced, and hence, cannot assist the defendants to unlawfully claim the suit land, which the deceased seller did not lawfully own in the first instance.
51. The defendants rely on written submissions dated 25/6/2025. It is submitted that the testimony tendered before the court shows that there are duplicate certificates of title to the suit land and that the one held by the plaintiffs was unlawfully and unprocedurally acquired, hence impeachable under Section 25 of the *Land Registration Act*.
52. The defendant submitted that the plaintiffs tendered evidence that the letter of offer to the late Jason Aimba was never cancelled for the land to be available for re-allocation to the plaintiffs, contrary to D. Exhibit No. (5). Reliance is placed on *Munyu Maina -vs- Hiram Gathiha [2013] eKLR* and *Kibera -vs- Mwangi & Another ELC No. 142B of 2021*.
53. The issues calling for the court's determination are:
- (1) If the plaintiffs have proved that they lawfully acquired Land Parcel No. Kitale Municipality Block 8/73 to be entitled to it.
 - (2) If the defendant is a trespasser on the suit land.
 - (3) Whether the defendant is justified in occupying the suit land.
 - (4) Whether the plaintiffs are entitled to the reliefs sought.
 - (5) Whether the defendant has a valid counterclaim.
 - (6) What is the order as to costs?



54. It is trite law that parties are bound by their pleadings and issues for the court's determination, which flow from the pleadings. See *Raila Odinga & Others -vs- Independent Electoral and Boundaries Commission & Others* [2017] eKLR. What the plaintiffs have pleaded in their plaint dated 4/1/2019 is that they lawfully acquired title to Kitale Municipality Block 8/73, which has been trespassed upon by the defendant, hence the prayer for eviction and permanent injunction.
55. On the other hand, the defence and the counterclaim dated 26/2/2019 term the title held by the plaintiffs as fraudulent or illegal, trace their right title or interest on the land as bona fide purchasers from the initial allottee Jason Oyano Aimba and his wife, now deceased, vide sale agreement dated 21/8/1997. The defendant counterclaims for a declaration as a bona fide purchaser, and for cancellation of the plaintiffs' title.
56. When a land title is under challenge, it is not enough for a party to produce the instrument of title without showing that the instrument of title was obtained procedurally, formally, regularly, and lawfully. See *Munyu Maina -vs- Hiram Gathiha* (supra). In *Hurbert Martin & Others -vs- Margaret P. Kamar & Others* [2016] eKLR, the court said that when faced with two titles for the same land, investigations would start at the root of title, whether each conformed with the processes of acquisition, without a break in the chain.
57. In *Sehmi & Another -vs- Taraban & Co. Ltd & Others* [2025] KESE 21 [KLR] (11th April 2025) (Judgment), the court set out the ingredients of a bona fide purchaser whose burden to discharge is on the alleged purchaser to show innocence, purchase for value, and legal estate. The court said that innocence means the purchaser must act in good faith, exercise due diligence by conducting a reasonable inquiry into the status of the estate or land he seeks to purchase, and pay value for the estate in exchange.
58. As to an original allottee of a leasehold, the court said that anyone who purchases a leasehold from the original allottee could therefore only acquire the unexpired term of the lease. The court said that the doctrine did not cover a purchaser of an illegally or irregularly allocated title to public land, since the holder could not confer on a third party a valid title. The court cited with approval *Torino Enterprises Ltd -vs- Attorney General* (supra), that inspection of the premises before purchase is critical.
59. Further, the court cited with approval *Dina Management Ltd -vs- County Government of Mombasa & Others* Petition 8 (E010 of 2021) (2023) KESC 30 [KLR], that the title or lease is an end produce of a process and where a root of title is challenged, a purchaser could not benefit from the doctrine of bona fide purchaser if the suit property had been illegally or irregularly allocated, for equity follows the law.
60. What each of the parties has pleaded is that their respective titles arose as a result of allotment letters. The allocation process of unalienated land was laid out in *Nelson Kazungu Chai & Others -vs- Pwani University* [2014] eKLR. A part development plan must be drawn and approved by the Commissioner of Lands and or the Minister for Lands.
61. After a part development plan, a letter of allotment is drawn based on the approved PDP and then issued to the allottee. Compliance with the terms of the letter follows, after which a cadastral survey is conducted for the purposes of issuance of a certificate of lease. In *African Line Transport Co. Ltd -vs- Attorney General* MSA HCCC No. 276 of 2013, the court said that in the normal course of events, planning comes first then surveying follows, and therefore a letter of allotment must have a definite number, which then is taken to the Department of Survey, who upon completion of survey, would refer it to the Director of Survey for authentication and approval. The court held that a part development plan can only be prepared in respect of government land that has not been alienated or surveyed. In *Funzi Island Development Ltd & Others -vs- County Council of Kwale* [2014] eKLR,



- the court observed that a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular.
62. A letter of allotment has to be perfected to confer an interest in land by fulfilling the conditions set therein, such as payment of the standard premium and ground rent within the prescribed timelines.
 63. In *Torino Enterprises Ltd -vs- Attorney General* (supra), it was held that even after perfection of an allotment letter, an allottee could not pass a valid title to a third party, unless and until he had acquired title to the land through registration under the applicable law.
 64. In this suit, the defendant traces his claim to an allotment letter to the late Jason Aimba, produced as D. Exhibit No. 1(a) and (b), and a lease produced as D. Exhibit No. (3). Equally, the defendant relies on D. Exhibit No. (5), as a basis that the mother title was held in the name of the deceased, hence the basis to sell the land by a sale agreement dated 21/8/1997.
 65. On the other hand, the plaintiffs rely on an allotment letter dated 5/10/1995, acceptance letter dated 26/11/2013, payment receipt dated 20/12/2013 and 10/1/2014, correspondence letter dated 30/12/2013 from National Land Commission and letter dated 10/1/2014 from the Director of Surveys, copy of lease and a certificate of lease for Kitale Municipality Block 8/73 produced as Exhibits No. 1 - 8.
 66. The defendant, on the other hand, seeks to impeach D. Exhibits. No. 1 and 8 on account of fraud and illegality. As held in *Virjay Morjaria -vs- Nansingh Madhusingh Darbar* (supra), fraud must be specifically pleaded and proved on a balance higher than in ordinary suits. A court cannot infer any fraud or illegality without tangible and cogent evidence. Production of exhibits is one thing. Proving their veracity, credibility, reliability and authenticity is another.
 67. Documents marked for identification are not evidence; calling the makers of documents is key. See *Ken Mwige -vs- Austin Kiguta & 2 Others* [2008] KEHC 2938 (KLR).
 68. The paper trail produced by the defendant depicts several breaks in the chain of acquisition of title. The letter of allotment produced as D. Exhibit No. 1(a) and (b) has no PDP. The documents do not refer to a specific suit land. D. Exhibit No. 1(a) and (b) differ from the lease produced as D. Exhibit No. (3). DMFIs No. 4, 5, 6, and 7 were not produced as exhibits. No evidence was called from the allocating authority to inform the court which allotment letter was first in time and whether the deceased was the first to comply with its terms and conditions. As of 1997, there is no evidence that the deceased had perfected his letter of offer and became the registered owner of Kitale Municipality Block 8/73 for the defendant to allege that the same was not available for re-allocation, as shown by P. Exhibits No. 1-9. It is not enough to allege without proof. The defendant was not party to the allotment letters. Evidence of compliance with the terms and conditions of the same by the allottee is missing.
 69. DW3 was unable to tell the court if his late father had perfected the letters of allotment before he passed on in 1998. Between 1998 and 2016, there is no evidence that the defendant had taken any steps to regularize their occupation, possession and registration of the lease, if at all it had been issued to the deceased.
 70. What amounts to a free property of a deceased is defined by Section 3 of the *Law of Succession Act*. There is no evidence that the deceased had obtained title to the suit land by 1998, which was capable of falling under his estate. The burden of proof to establish those facts fell with the defendant in order to succeed in impeaching the title held by the plaintiffs. See *Raila Odinga & Another -vs- IEBC* (supra). The said burden to impeach the title held by the plaintiffs as fraudulent, or irregular, was not discharged to the required standard as per *Arthi Highway Developers Limited -vs- West End Butchery Limited & 6 Others* [2015] eKLR.



71. Since the deceased had no title or interest capable of being conferred to the defendant, obviously, it goes without saying that the defendant has no basis to challenge the title held by the plaintiffs. DW1 and DW2 said that they only planted maize on the land and had yet to undertake any permanent developments thereon. The sale agreement did not refer to Kitale Municipality Block 8/73.
72. Evidence that the defendant conducted any due diligence before undertaking the sale agreement or taking vacant possession is lacking. It is not enough to allege the doctrine of an innocent purchaser for value without proof. The ingredients of an innocent purchaser for value, as set out by the Supreme Court, include innocence, valuable consideration and a clear estate being transacted upon. The defendant has, unfortunately, failed to meet those conditions.
73. Trespass is defined in Section 3(3) of the *Trespass Act* as unjustified entry into and cause of acts of destruction in private land without justification. Immediate and exclusive possession of the land as held in *M'ikiara M'rinkanya & another -vs- Gilbert Kabere M'mbijiwe & another* [2014] eKLR, is what the plaintiffs have proved. Trespass is actionable per se without proof of any loss or damage as held in *Kenya Power & Lighting Company Ltd -vs- Eunice Nkirote Ringera* [2020] KECA 54 (KLR), 18 December 2020. Continuing trespass is what the plaintiffs have pleaded. The defendant has not tendered any evidence of valid and enforceable equitable or legal interests or rights to the land, capable of falling under Sections 24, 25, 26, 27 and 28(h) of the *Land Registration Act* to defeat the title held by the plaintiffs under Article 40(6) of *the Constitution*.
74. The plaintiffs have proved right to own, use and occupy the suit land. The upshot is, I find the plaintiffs' suit proved to be entitled to the reliefs sought in terms of prayers No. (a) and (b). The defence and counterclaim by the defendant is not only unsubstantiated, lacking merits, but also incompetent. It is dismissed with costs to the plaintiffs. The defendants shall hand over vacant possession after 90 days from the date hereof, in default, eviction to issue.
75. Orders accordingly.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 17TH DAY OF SEPTEMBER 2025.

In the presence of:

Court Assistant - Dennis

Munialo for the defendant present

Teti for the plaintiff present

HON. C.K. NZILI

JUDGE, ELC KITALE.

