Patel v Kaitui Enterprises Co Ltd & 5 others (Environment & Land Case 55 of 2017) [2024] KEELC 562 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 562 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 55 OF 2017

MC OUNDO, J

FEBRUARY 8, 2024

BETWEEN

SAROJBALA M PATEL ..... PLAINTIFF

AND

KAITUI ENTERPRISES CO LTD ..... 1ST DEFENDANT

COMMISSINER OF LANDS ..... 2ND DEFENDANT

ATTORNEY GENERAL ..... 3RD DEFENDANT

CHIEF LAND REGISTRAR ..... 4TH DEFENDANT

SIMEON KIPROTICH RUGUT ..... 5TH DEFENDANT

ERICK KIPRONO TONUI ..... 6TH DEFENDANT

JUDGMENT

1. This matter was initially filed at the Kericho High Court as Civil Suit No. 45 of 2002 wherein an ex-parte Judgement was entered in favour of the Plaintiff and against the 1st Defendant on 19th April 2007 due to failure by the said 1st Defendant to enter appearance. However, Pursuant to the 1st Defendant's Application, by consent the aforementioned ex-parte judgement and the ex-parte proceedings leading to the said judgement were set aside and the 1st Defendant was granted leave to join the 5th and 6th Defendants herein. In her Plaint dated the 7th June 2002, and amended on the 30th March 2011 pursuant to a consent order of 16th March, 2011, the Plaintiff herein sought for judgement against the Defendants jointly and severally for:

    i. A declaratory Order that L.R No. Kericho Municipality/Block 4/69 formerly known as L.R No. 631/1590 Kericho Municipality belongs to the Plaintiff.

ii. An order of cancellation of the 5th and 6th Defendants' names from the Register of Titles over L.R No. Kericho Municipality/Block 4/69 formerly known as L.R No. 631/1590 Kericho Municipality.

iii. An order of eviction of the 5th and 6th Defendants from L.R No. Kericho Municipality/Block 4/69.

iv. General Damages.

v. Costs of the suit.

vi. Interest at court rates.

2. Upon service of the Plaint, the 1st Defendant filed its statement of defence and Counterclaim dated the 10th May, 2010 and amended on 11th June, 2018 denying the contents contained in the amended Plaint for reason that it legally acquired the suit land L.R No. 631/1590 Kericho Municipality in the year 1996 but sold and transferred the said suit land to the 5th and 6th Defendants in the year 2006. That both parties had made substantial developments thereon. That the Plaintiff's suit was statutory time barred and it shall seek at the earliest opportunity to have it dismissed and/or struck out with costs.

3. The 2nd, 3rd and 4th Defendants filed their Statement of Defence dated 29th August, 2002 and amended on the 6th of March 2018 with a counterclaim to which they denied the contents of the Plaintiff's amended Plaint putting the said Plaintiff to strict proof. In their counterclaim, the 2nd, 3rd and 4th Defendants claimed a sum of Kshs. 96,796/= with interest which amount had been paid to the Plaintiff subject to the judgement delivered on 19th April, 2007.

4. Vide a Reply to the 2nd, 3rd and 4th Defendants Amended Statement of Defence dated 26th March, 2018, the Plaintiff reiterated the contents of her Amended Plaint and stated that the 2nd Defendant had offered her a Grant of all that parcel of land known as Surveyed Residential Plot-Kericho Municipality through an allotment letter dated 1st February 1996 and that it had been as a result of the 2nd and 4th Defendants fraudulently issuing Title documents to the 1st Defendant that they had aided the said 1st Defendant to transfer the suit land to the 5th and 6th Defendants. That the Plaintiff was issued with a lease term of 99 years from 1st February 1996 which lease was still operational to date as she had been paying the required rent and rates under the said lease.

5. The Plaintiff denied the Contents in the 2nd, 3rd and 4th Defendants' counterclaim but acknowledged having been paid a sum of Kshs. 96,796/= by the 2nd, 3rd and 4th Defendants pursuant to a lawful judgement of the High Court dated 19th April, 2007. That since the judgement was set aside by consent and the instant suit was yet to be finalised, the 2nd, 3rd and 4th Defendants should await the determination of the instant suit since costs follow the outcome of the suit. The Plaintiff thus prayed that the 2nd, 3rd and 4th Defendants' Counterclaim be dismissed with costs.

6. The 5th and 6th Defendants' statement of defence and counterclaim dated the 19th May, 2011 and amended on the 20th March 2018 was a denial of the contents in the amended Plaint. Their argument was that if at all the Plaintiff was issued with the title to the suit property, the same was as a result of the ex-parte judgement herein entered against the 1st Defendant on 19th April, 2007 which judgement and proceedings were set aside on vide a consent dated the 20th April, 2010 between the Plaintiff and the 1st Defendant. That consequently the cancellation of the 1st Defendant's title to the suit land was vacated and the Plaintiff was returned to the position that she had been at the time of instituting the instant suit. That they were bonafide purchasers for value, having jointly purchased the suit land on

7th July, 2006 from the 1st Defendant who was the sole registered proprietor thus they had obtained a good title over the suit land to which the Plaintiff could not assert right over.

7. In their counterclaim they (5th and 6th Defendants, now 1st and 2nd Plaintiffs) pleaded that in the event that the court grants the original Plaintiff the prayers sought, then the 5th and 6th Defendants (now 1st and 2nd Plaintiffs) would be entitled to damages against either the Plaintiff and/the 1st, 2nd, 3rd and/or 4th Defendants which measure of damages would take into consideration the fact that property appreciates in value, be the current value of the suit land and the improvements therein plus interest as may be at the time of determination of the instant suit. The 5th and 6th Defendants also averred that the Plaintiff's claim against them was time barred.

8. The 5th and 6th Defendants thus sought for the following orders:

   i. That the Plaintiff's suit be dismissed against the 5th and 6th Defendants (sic).

   ii. In the alternative and subject to the Plaintiff being granted the prayers sought, damages for the value of the suit land plus all the improvements at the time of determination of this suit, such damages to be computed and quantified as this honourable court may direct and deem just.

   iii. Interest

   iv. Cost of this suit and of the counterclaim.

   v. Any other or future relief that this Honourable Court may deem fit and just to grant (sic)

9. A Reply, dated the 25th June 2018, to the amended 5th and 6th Defendants defence and counterclaim was filed on the 26th June 2018 in which the Plaintiff joined issues with the 5th and 6th Defendant as to whether the Certificate of Lease issued to the Plaintiff was pursuant to acceptance of the 2nd Defendant's offer of a Grant by way of payment of stand premiums contained in the said offer and subsequent regular payments of Land Rent and Rates due thereof for the period 1996 to 2018. Whether the question of ownership of the suit land had been determined by the 2nd Defendant since the Land Register showed that the Plaintiff was the registered owner as at 8th March, 2011. That any transfer of title from the 1st Defendant to the 5th and 6th Defendants took place after the ex-parte judgement was delivered and before it was set aside hence the 5th and 6th Defendants could not obtain legal titles to the suit land and any purported developments carried out by the 5th and 6th Defendants amounted to trespass on the Plaintiff's property. That since the 1st Defendant had no good title, the same being tainted by fraud, there was none to pass to the 5th and 6th Defendants whose names did not currently appear in the Register.

10. The Plaintiff denied the contents in the 5th and 6th Defendant's counterclaim and stated that there existed no privity of contract between herself and them hence there was no cause of action between them in the context of the counterclaim. The Plaintiff thus prayed for judgement against the 5th and 6th Defendants as prayed in the Amended Plaint and further that 5th and 6th Defendant's counterclaim be dismissed with costs.

11. The 1st Defendant vide its Amended Statement of Defence with Counterclaim dated 11th June, 2018 denied the averments in paragraph 12 of the 5th and 6th Defendant's amended defence specifically that the Plaintiff was entitled to claim for damages against the 2nd, 3rd and 4th Defendants and put the said 5th and 6th Defendants to strict proof. motors

12. The matter did not take off for hearing immediately due to numerous attempts by the parties to settle the dispute out of court. However, the parties having failed to reach out of court settlement, it had

proceeded for hearing on the 22nd May, 2019 when the Plaintiff Sarojbala Mansukhbai Patel testified as PW1 to the effect that she lived in Kisumu and worked at A-Z Pharmacy. She adopted her witness statements dated 17th October, 2017 and 2nd November, 2017 as her evidence in chief then proceeded to produce the list and bundle of documents filed on 2nd November, 2017 as Pf exhs 1-68.

13. She also produced the supplementary list of documents filed on 21st November, 2017 as Plaintiff's exhs 69 and 70 before proceeding to testify that her claim was with respect to land parcel No. L.R No. 631/1590/Kericho Municipality Block 4/69 (suit land). That although the suit land had been allocated to her in the year 1996, yet the title had been issued to the 1st Defendant. She sought that the suit land be declared hers. She also sought for an order cancelling the 5th and 6th Defendants title, an eviction order and costs of the suit.

14. When cross examined by Counsel for the 1st Defendant, the Plaintiff's response was that although she was staying in Kisumu and working at A-Z Pharmacy, she was claiming a parcel of land in Kericho having been issued with an allotment letter on 1st February, 1996. She referred to Pf exh 4 and explained that the said allotment letter had an attached Plan which she did not have. That the allotment letter had certain conditions one of them being that she was to pay a sum of Kshs. 32,963/=. That she had accepted the conditions in the letter of allotment and made the necessary payment as evidenced by a banker's cheque dated 16th April, 1996 produced as Pf exh5.

15. She testified that she was also issued with a receipt by the Ministry of Lands on 16th May 1996 which she produced as Pf exh6 and that on 25th September, 1997 she wrote a letter to the Commissioner of Lands complaining that someone had fenced the plot and cleaned the compound. That the suit land was shown to her by her husband although she did not know who had showed him the same. She testified that according to a letter dated 27th July 2001, the Permanent Secretary had written to the Commissioner of Lands stating that there had been double allocation with respect to L.R No. 631/1590 Kericho Municipality.

16. That on 4th October, 2001, she had written to the Permanent Secretary in the Ministry of Lands suggesting that she be given a plot in Kisumu if she could not get the Kericho plot. That upon following up on the issuance of a plot in Kisumu, she had been informed via a letter dated 26th August, 2002 by the Commission of inquiry into the land law system of Kenya, that there had been a ban on land allocation. She was thus advised to wait for the lifting of the ban.

17. She further testified that in addition to the sum of Kshs. 32,963/= that she paid, she had been paying land rent and rates. That she became aware of the double allocation in October 1997. That whereas she had never taken physical possession of the suit land, she was still getting the demand notices for the said suit land. That whilst she was aware that someone had built on the suit land, she did not want a refund of the amount she had paid, all she wanted was the suit land.

18. She explained that she took long to file the case because she was in correspondence with the Ministry of Lands. She confirmed that the suit land measures 0.22 hectares and was currently registered in the names of the 5th and 6th Defendants. However, she testified that she also had her own title which was issued pursuant to a court order. That she did not know the current value of the suit land. Further that one of the conditions in the allotment letter was that she was to write a formal acceptance letter but she did not have the said letter in court.

19. In response to the cross examination by Counsel for the 2nd, 3rd and 4th Defendants, she confirmed that she was issued with a letter of allotment on 1st February, 1996 wherein she was to pay the amount stated in the said letter within 30 days which payment she made on 16th April, 1996 which was about 2 ½ months from the date of the Allotment Letter. That whilst she did not know why the suit land

was allotted to someone else, when she had made a follow up, she had been told to pay the land rent and rate after which she would be issued with a title deed. She reiterated her testimony that she had been promised an alternative land in Kisumu only to be informed of the ban on land allocation and therefore she never got an alternative piece of land in Kisumu.

20. That in the year 2007 she had received a judgment in her favour after which she had been issued with a title deed and her advocate paid costs of the case. She reiterated that although she was aware that there had been houses that had been constructed on the suit land, she still wanted the suit land as the same had been allocated to her.

21. On cross-examination by the Counsel for the 5th and 6th Defendants, she stated that she had a title to the suit land and was not aware of the consent setting aside the judgment in her favour. When referred to the 1st Defendant's list of documents, she confirmed that she saw a document which indicated that the interlocutory judgment was set aside. She admitted that she was not familiar with the procedure for the purchase of land and when she was referred to a search certificate dated 5th July, 2006 she confirmed that the same showed that the land was registered in the 1st Defendant's name. When she was further referred to Pf exh30, she confirmed that the same was a title but testified that she did not remember being issued with a Grant.

22. That whereas she was aware that the 5th and 6th Defendants were in possession of the suit land, she was not aware that the said Defendants were claiming Kshs. 42 million. She admitted to having not notified the 5th and 6th Defendants that she had a claim over the suit land. That she was not aware that the 1st Defendant was the first registered owner of the suit land. That whilst the title that she had included in her list of documents was issued in the year 1996, her title was issued in the year 2010 but she could not remember registering any caveat at the Lands office.

23. On being re-examined by her Counsel, she stated that there was nothing indicating that she had received the letter of allotment on 1st February, 1996 as that was merely the date of the letter. She reiterated that upon receipt of the said allotment letter she made payment of the amount indicated in the said letter.

24. When she was referred to the letter dated 25th September, 1997, she stated that the same did not mention the name of the person who was issued with another allotment letter while the letter dated 27th July, 2001 mentioned that there was double allocation. When further referred to the letter dated 4th October, 2001, she confirmed that she had accepted a plot in Kisumu on condition that it was issued to her within 30 days but vide a letter dated 26th August, 2002, she was informed that there was a presidential ban on land allocation.

25. She testified that by the time she received the said letter, she had already filed the instant suit. She reiterated that she was aware that the 5th and 6th Defendants had constructed on the suit property although she could not remember what their counterclaim stated.

26. That the said 5th and 6th Defendants did not seek her permission before the construction was done. She acknowledged that in her letter dated 4th October, 2001, she referred to the 1st Defendant although she had not sued the said 1st Defendant. That she had not taken possession of the suit land as she had not obtained the title. She reiterated that other than the amount in the letter of allotment, she had also been paying land rent and rates. She maintained that the suit land belonged to her. That the plot she was allocated was an un-surveyed plot and that the Defendants had illegally acquired her land.

27. On 27th February, 2020, PW1 had been recalled to produce a copy of the Map as Pf exh 4(b). On cross-examination by the counsel for the 1st Defendant, she stated that the same was a copy of the map

that had been attached to her allotment letter. That she did not know the total amount reflected in the receipt she produced in court as she did not add up the amount. On being cross-examined by the counsel for the 2nd, 3rd and 4th Defendants, she confirmed that the said map was given to her together with allotment letter. On re-examination, she stated that if one summed up the amounts in the receipts she had produced in court, they would know the total amount she had paid.

28. Dr. Mansukhbai Patel testified as PW2 on 27th February 2020 to the effect that he was a medical practitioner in Kisumu and that the Plaintiff was his wife. He adopted his witness statement dated 16th October, 2017 as his evidence in chief and when he was referred to Pf exhibits 2(a) and 4(b) he confirmed that the same was an allotment letter and a map respectively. He proceeded to testify that he learnt that the 1st Defendant had been allotted the land on 29th January, 2002 after which he contacted his lawyer who wrote a letter herein produced as Pf exh 22 to the Commissioner of Land wherein there had been response via a letter dated 14th February, 2002 herein produced as Pf exh 23.

29. That thereafter, there had been several correspondences as shown in their exhibits herein produced, but he did not get favorable communication even after his lawyer sent their documents of ownership. When he was referred to Pf exh 69, he confirmed that the same was a letter dated 6th April, 2008 addressed to Chief Land Registrar sending the judgment and decree that the court had given. He was also referred to Pf exh70 whereupon he confirmed that the same was a letter dated 14th October, 2008, sent by the Plaintiff to the Commissioner of Lands but they were still not issued with a title.

30. That eventually, the said Commissioner had communicated to them telling them that the rates and rents had not been paid from the year 1999 to the year 2009 and demanded that they pay a sum of Kshs. 359,250/= as evidenced by Pf exh 35. Resultantly, payment of what was demanded was made on 2nd June, 2009 as evidenced by receipts of payment herein produced as Pf exh 36. That he had paid land rent of Kshs. 117,107/= as evidenced by Pf exh37 being the bank payment slip from National Bank, Kisumu.

31. That subsequently, they had received a letter from the Commissioner of Land dated 10th June 2009 herein produced as Pf exh39 and addressed to Land Registrar, Kericho, asking him to process the title for them. When he was referred to the Pf exh 40, he confirmed that the same was a letter dated 25th June, 2009 from the Land Registrar indicating that the suit land was already registered to the 1st Defendant hence the said Registrar was unable to process the title in the Plaintiff's name.

32. He was further referred to the Pf exh 42 wherein he confirmed that it was a letter dated 12th February, 2010 from the Commissioner of Land, to the Land Registrar indicating that the 1st Defendant's title was nullified through a court order. That the Land Registrar gave them the title on 23rd February, 2010 and he had been paying rates and rents since then as evidenced by the exhibits herein produced. He sought that the Plaintiff gets vacant possession of her land back plus the costs of the suit. He also sought for cancellation of title issue to the 5th and 6th Defendants and an eviction order to ensue. Finally, he sought for orders in relation all that the Plaintiff had sought in her Amended Plaint including general damages.

33. On cross-examination by Counsel for the 1st Defendant, he had responded that he thought the Deed plan was in the court file behind the letter of allotment. When he was referred to Pf exh4, he confirmed that the same was the allotment letter issued on 1st February, 1996 with the terms of allocation being the payment of Kshs.32,963/= which payment had been made. That the land he was allotted was the one shown edged Red on the plan No.22/93/24.

34. That the area was 0.22 hectares. When he was further referred to page 2 of the Pf exh4, he confirmed that they had accepted all the conditions in the Allotment Letter and the Plaintiff's offer was received

on 21st May, 1996 when the cheque went through the bank, which was about 76 days from the date of the offer. When he was referred to the Pf exh 1 and 11, he stated that he knew the 3rd party on 22nd September 1997 but they had filed the case on 7th June, 2002 and gave notice on 31st January, 2002 while the Plaintiff's amended plaint was dated 30th March, 2011

35. Upon being referred to the Pf exh 18, he stated that the Judgment was that the case was one of double allotment although he did not agree with the finding because it had indicated that two files had been opened on the suit land being No.181543 which was his and No.184200 for the other party. He was also referred to Pf exh19 where he confirmed that the same was a letter dated 4th October, 2001 and that he had not accepted an alternative parcel in Kisumu as 30 days period was his condition. After the 1st Defendant's Counsel had read the content of a letter dated 18th May, 2002, herein produced as Pf exh 25, the witness confirmed that although they had written the letter yet he had not accepted an alternative parcel.

36. On further being referred to Pf exh 30 he confirmed that it was the lease to the 1st Defendant and on being referred to the size of the land allotted to 1st Defendant, he confirmed that the same was 0.2834 hectares on survey plan No.210051. He however argued that the size of the land and the survey plan were different from that of the Plaintiff's land and that the same was a gift from the government which gift had not materialized.

37. That he had followed instructions and paid the land rate and rent within 30 days although the receipt of the same was late and which was not his fault. When Pf exh40, the letter of the land Registrar was read to him, he confirmed the details contained therein stating that he was aware that the 5th & 6th Defendants had put up a building on the suit land, wherein one of the houses being complete but not the other. That after Mr. Opar's Letter, they had written to the Commissioner of Lands severally without any response or action, the last letter having been written in the year 2021.

38. He testified that he had gone to the physical planner in Kisumu who had assured him that the land was available but before that, he had written to the government seeking that they gift him land. He however did not have the said letter with him in court. That his letter in file No.181543 contained the Deed Plan No 22/93/24 measuring 0.22 hectares which plan must have given rise to a lease but he was unable to see the lease number.

39. He confirmed that the 5th & 6th Defendants' lease was the one on file No.184200 and that Mr. Opar had mentioned in his letter on what had happened to the Plaintiff's file No.181543. He maintained that the second file was opened after the Plaintiff's payment date but he did not know what had happened to his file No.181543.

40. On the day scheduled for further hearing the Plaintiff and the 2nd, 3rd and 4th Defendants' case had been marked as closed for failing to avail their witnesses.

41. The 1st, 5th and 6th Defendants' case proceeded for hearing upon which Dr. Erick Kiprono Tonui, the 6th Defendant herein, testified as DW1 to the effect that he was a resident of Kericho and a medical doctor practicing in Bomet at Longisa Referral Hospital and Kericho outpatient Medical Centre. That together with the 5th Defendant who used to work as an accountant at Finlays, they had bought a piece of land title number Kericho/Municipality/Block 4/69 in the year 2006 from Kaitui Enterprises, the 1st Defendant herein.

42. That they had done due diligence by conducting a search on the title deed they had been issued by the 1st Defendant. He produced the said search dated 5th July, 2006 as Df exh 1. He also produced a copy of the title to land parcel No. Kericho Municipality /Block 4/69 as Df exh 2 and proceeded to testify that

thereafter they had entered into a Sale Agreement dated 7th June, 2006 with the 1st Defendant, which Sale Agreement he produced as Df Exh 3. That after purchasing the land, they conducted another search to check if the title to the suit land was registered in their names. He produced the said search dated 28th May 2009 as Df Exh 4. That they later got a title to the suit land which title he produced as Df Exh 5 and stated that the said suit land measured 0.2834 hectares

43. His evidence was that they later heard that the Plaintiff had a claim over the suit land although the person who sold the suit land did not have knowledge of the Plaintiff's claim. That they had taken possession and occupation of the land in the year 2006 but they heard about the Plaintiff's claim over the suit land after 4 years of their occupation. That they had fenced and developed 2 blocks in the suit land wherein the first block contained two, 2 bedroom units while the second block contained four 3 bedroom units which were still under construction. That there were also two blocks of servants' quarters. That they were still in occupation of the suit land to date.

44. His further evidence was that they did a valuation of the developments on the suit land. He produced a valuation report dated 16th October, 2017 as Df Exh 6 then proceeded to testify that in acquiring the suit land, they had not been subjected to any criminal process. He reiterated that by the time they were purchasing the suit land, they were not aware of the Plaintiff's claim and that they took over the property in the year 2006 and had been in occupation of the same since then. That they had servants and people living on the suit land.

45. He maintained that they acquired the suit land legally but should the court find that the suit land belongs to the Plaintiff, they were seeking for full compensation of the developments done therein.

46. His response on being cross-examined by the Counsel for the 1st Defendant was that the suit land was vacant when they bought it and that it was the 1st Defendant who took them to the suit land in the company of a surveyor, and showed them the beacons. He maintained that they took possession of the suit land in the year 2006, fenced it and took occupation where they had enjoyed quiet possession.

47. On being cross-examined by the Counsel for the Plaintiff, he reiterated that they had been in occupation of the suit land since the year 2006 although they had not been paying the rates and rent because a case had been filed in court. That before they bought the land, they had checked its origin and that the locals and neighbors were aware that the same belonged to the 1st Defendant. That they did due diligence in the land Registry wherein it was confirmed that the land belonged to the 1st Defendant. That they had even fenced and build thereon and no one had laid claim over it.

48. He reiterated that when they purchased the suit land, neither they nor the 1st Defendant were aware of the matter before the High court. That they only came to know about the case between the year 2010 and 2011 when they were informed that somebody was laying claim over the land. That when they took occupation of the suit land in the year 2006, there was no development, it was a plain piece of land and that all the developments therein was done by themselves. He clarified that they built their first development in the year 2006 but when the instant matter was filed in court, they stopped developing the suit land.

49. The next defence witness DW2, Jane Chepkwony testified to the effect that she was the director of the 1st Defendant. That in the year 1994, together with her late husband Mr. Wilson Chepkwony, they had registered the 1st Defendant. That in the year 1996, she was allotted land parcel No. Kericho Municipality LR 631/1590 measuring 0.2834 hectares which land was under survey plan No.210051. That the said land was Grant No.72/35 and the annual rent was Kshs.5,600/=.

50. She produced the Certificate of Lease dated 1st February, 1996 that is, Pf exh10 as Df Exh 7 then proceeded to testify that after they got the Grant, they converted the same into title No. Kericho

Municipality /block 4/69 on 28th June, 2006 as evidenced in the copy of the title and official search earlier on produced as Df Exh 1 and 2. That on 7th July, 2006 they sold the suit land to the 5th and 6th Defendants as evidenced from the Sale Agreement which had been produced as Df Exh 3. That the said 5th and 6th Defendants paid them the purchase price and they transferred the suit land to them.

51. Her evidence was that in the year 2010 they came to learn of a case in court which had proceeded Ex-parte. Subsequently, they sought for the Ex-parte Judgment to be set aside hence the instant matter before court. She denied ever ''cooking'' the documents she was relying upon to lay claim on the suit land and maintained that the Plaintiff's supposed land and their land were two different parcels of land for the reason that;

    i. The sizes are different since while their land measures 0.2834 hectares, the Plaintiff's land measures 0.22 hectares.

    ii. The stand premium was different, while theirs was Kshs. 28,000/= the Plaintiff's was 22,000/=.

    iii. The survey plan was different, while theirs was 21005, the Plaintiff's was 22/93/24 although the Plaintiff had not attached her survey plan.

    iv. The Grant number was different, with theirs was 72/3572/35, the Plaintiff's was 21350/XXIX but again the Plaintiff did not also attach the Grant

    v. The annual rent was different, theirs was Kshs.5,600/= while the Plaintiff's was 4,400/=

    vi. That the land Reference given to their land was LR No.631/1590 while the Plaintiff's was Unsurvey Residential Kericho.

52. That from the Plaintiff's documents, the government had offered to give her a plot in Kisumu. Thus, Plaintiff's case ought to fail and the same be dismissed with costs.

53. On cross examination by the Counsel for the 2nd, 3rd and 4th Defendants, she testified that they took possession of the land as soon as it had been allocated to them in the year 1996. That they learnt of the case in the year 2010 but between the years 1996 and 2010 nobody had claimed ownership of the suit land.

54. Upon being cross-examination by the Counsel for the 5th and 6th Defendants, she stated that the suit land was given to them through a letter of allotment and that the original allotment was in possession of her husband. That they paid for the allotment after which the title was issued to them although she did not have the receipt in court.

55. She reiterated that they took possession of LR 631/1590 and that she knew that the land was allotted to her husband who had paid for it and that was why they had the documents. That they had been paying rates and rent on the suit land and they were up to date in their payment by the time they sold the said land.

56. She maintained that they knew about the case in the year 2010 and that the said case had been heard without their knowledge. That the Plaintiff was to be given another land although she did not understand the reason for the same. She confirmed that they were allotted the suit land in the year 1996.

57. When she was referred to Pf exh 6, receipt No. D448477, she testified that she was aware that there was a Judgment although she was not aware of its contents. That she had not received a letter from the land commission concerning the case. That she had occupied the land in the year 1996 and that there was no development therein until the purchasers bought the land.

58. In re-examination by her Counsel, she maintained that she paid rates and rents to the property otherwise the transfer would not have gone through. That the county had not demanded any outstanding rates from them and that if they had not paid for the allotment, they would not have been given the Grant.

59. On being examined by the court, she clarified that the suit land was allotted to the Enterprise, the 1st Defendant herein.

60. The 1st, 5th and 6th Defendants thus closed their case and parties were directed to file and exchange their written submissions for which I shall summarize as herein under.

Plaintiff's written submissions.

61. The Plaintiff vide her submissions dated 16th October, 2023 and filed on 26th October, 2023 summarized the brief background of the matter before framing her issues for determination as follows;

    i. Whether L.R No. Kericho Municipality/Block 4/69 formerly known as L.R No. 631/1590 Kericho Municipality (the suit land) was duly allotted to the Plaintiff and if so, whether the said plot was thereafter available for re-allocation to the 1st Defendant or any other person

    ii. Whether the transfer and registration of L.R No. Kericho Municipality/Block 4/69 formerly known as L.R No. 631/1590 Kericho Municipality (the suit land) to the 5th and 6th Defendants was lawful.

    iii. Whether the Plaintiff is entitled for the reliefs sought at the foot of the Plaint (sic).

62. On the first issue for determination, the Plaintiff submitted in the affirmative and reiterated her evidence in court and submitted that the only way of arriving at the truth was to compare her letters of allotment, allotment fees, survey reports and title deeds with the 1st Defendant's documents which would then prove that the land in issue was the same piece of land.

63. The Plaintiff placed reliance on the decided case of African Line Transport Co. Ltd vs. The Hon. Attorney General, Mombasa HCCC. No. 276 of 2013 (sic) to submit that the 1st Defendant neither paid for the survey fees, allotment fees nor title deed fees as there had been no production of any documentary evidence to that effect. That the date of submission and the last two lines of Pf exh13 clearly showed that the 1st Defendant used the Plaintiff's survey report and survey fees to acquire their RTA title deed. Further reliance was placed in the decided case of Republic vs. City Council of Nairobi & 3 Others [2014] eKLR to submit that once an Allottee had complied with the terms of the letter of allotment, the land became unavailable for re-allocation.

64. She submitted that the instance matter was not a case of double allocation but one of illegal allocation that was done in total disregard of the law. That although the 2nd and 4th Defendants signed Plaintiff's title deed documents on 25th May, 2009 and later allowed the transfer of the suit land from the 1st Defendant to 5th and 6th Defendants on 27th May, 2009 yet the said 1st, 5th and 6th Defendants had failed to produce the Land Board approvals, letters of transfer among other documents required. Instead, they had only produced the illegally acquired title deed and an illegal sale agreement. She urged the court to take note of the fact that the 1st Defendant did not adduce any receipts or proof of payment to support its claim in comparison to the Plaintiff who had been receiving demand notice for payment of land rates and rent monies which she had paid sometimes even with penalties and interest from the year 1996 to date as evident from the documents produced in court. That the 1st, 5th and 6th Defendants did not produce any receipts of payment of land rent and rates yet they had been benefitting from the said piece of land by virtue of their occupation.

65. Reliance was also placed on the decision in Joel Munyoki Munene v Agness Kagure Kariuki & 2 Others [2022] eKLR to submit that L.R No. Kericho Municipality/Block 4/69 formerly known as L.R No. 631/1590 Kericho Municipality, the suit land herein, was dully allocated to the Plaintiff who received a valid title hence the said land was not available for re-allocation. That the registration of the land to and in favour of the 1st Defendant was predicated and/or premised on the illegal and unlawful documents hence the entire process was illegal, un-procedural and void ab initio.

66. On the second issue for determination as to whether the transfer and registration of the suit land to the 5th and 6th Defendant was lawful, the Plaintiff submitted that the same was unlawful since the 1st Defendant did not have a valid title to the suit land. Further, that the Land office was fully aware of the court case civil suit No. 45 of 2002 as they had been informed of the same by the Plaintiff on the 28th March 2003 as per Plaintiff's exh 27. In utter disregard of that information, the Lands office had proceeded to issue a new title to the 1st Defendant on 5th July, 2006. That further, despite the letters dated 28th November 2007, 16th April 2008 and 14th October 2008 (Plaintiff Exhs 33, 69 and 70), the Land Office allowed the transfer of the land from the 1st Defendant to the 5th and 6th Defendants on 27th May, 2009 without payment of land rent and rates. That subsequently on the following day, the 28th May, 2009, after the said transfer, the lands office had asked the Plaintiff to pay the rent and rates with fine and interests as evidenced by Pf exh35.

67. The Plaintiff also placed reliance on the Provisions of Section 26 (1) (b) of the *Land Registration Act*, 2012 and the decided case of Embakasi Properties Limited & Another vs. Commissioner of Land & Another [2019] eKLR to submit that the 1st Defendant acquired the title to the suit land fraudulently as it did not comply with the letter of allotment requirement but rather obtained the same fraudulently in conspiracy with the 2nd Defendant as depicted in various correspondences produced as Pf exh12 and 13. That the argument in the Pf exh18 that there was a double allocation was an attempt to deceptively hide the truth and corruptly favour one of the directors of the 1st Defendant, the late Mr. Chepkwony, who was P.C and State House controller at that time. That indeed the contents in Pf exh18, a letter from the Permanent Secretary of Lands, was clear that the 'second file (the 1st Defendant's) had been opened after the first Allotee Mrs. Patel had already accepted the allotment and paid for the plot vide cheque No. 005515.

68. Reliance was further placed on the decision in the case of Munyu Maina v Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR to submit that the 5th and 6th Defendants were not bona fide purchasers and could not claim that their title was indefeasible since DW2 evidence on cross-examination was to the effect that she did not know how her husband acquired the suit land and even failed to produce an allotment letter or fee receipt for the said suit land, which documents were fundamental. That the 5th and 6th Defendants had also stated on cross-examination that they had relied on the certificate of official search dated 5th July, 2006 without ascertaining how the same title had been acquired.

69. Regarding the legality of the Sale Agreement dated 7th July, 2006, the Plaintiff submitted that as per the Registrar of Companies letter dated 15th October 2010 produced as Pf exh 45, the 1st Defendant herein had neither filed yearly returns nor paid any yearly fees from the year 2005 to the year 2010 as evidenced by the public notices herein produced as Pf exh 31, 32 and 34 hence any transaction done during that period was illegal.

70. As to whether there was acquisition by way of adverse possession, the Plaintiff submitted that the 5th and 6th Defendants could not claim that there had been no interference because suits had been filed concerning the suit land for example Civil Suit No. 45 of 2002 and the instant case in addition to many

other correspondences deputing ownership of the land. That Despite repeated attempts, the Plaintiff could not get the information or address of the entity that had taken possession of the suit land until January 2002 thus the said Plaintiff could not mount corrective legal action before then. That before then, every time, the land office had intentionally lied and given false hope to the Plaintiff as a means to corruptly deal in favour of the 1st Defendant as evidenced in the correspondences between the land office and the Plaintiff. That there had also been laxity on the part of the 2nd, 3rd and 4th Defendants to call in any witness. Reliance was placed on the decision in the case of Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E &L) 565 to submit that the transfer and registration of the suit land to the 5th and 6th Defendants was unlawful hence their title should be cancelled and reverted to the Plaintiff.

71. As to whether the Plaintiff is entitled to the reliefs sought in the Plaint, submissions were that in light of the foregoing, the Plaintiff had adduced sufficient reasons to persuade the court to exercise its discretion in her favour and award her the reliefs as prayed in the amended Plaint dated 30th March, 2011.

5th and 6th Defendants' submissions

72. In their Submissions dated 1st November, 2023 and filed on 2nd November, 2023, the 5th and 6th Defendants summarized the factual background of the matter as well as the evidence adduced in court before framing one issue for determination to wit; whether the Plaintiff had proved her case.

73. They then proceeded to place reliance on the Halsbury's Laws of England, 4th edition, volume 17 at para. 13 as well as Sections 107 (1) and (2) and Section 109 of the *Evidence Act* to submit that since the Plaintiff had alleged to be the owner of L.R No. 631/1590 Kericho Municipality now L.R No. Kericho Municipality/Block 4/69 (the suit land herein) which she had also alleged was formerly known as Un-surveyed Residential Plot-Kericho Municipality, it was incumbent upon her to prove the above allegations on a balance of probabilities.

74. Regarding what amounts to proof on a balance of probabilities, the 5th and 6th Defendants placed reliance on a combination of the decisions in the cases of Willium Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 and Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another [2015] eKLR cited at Para. 44 of Benard Philip Mutiso vs. Tabitha Mutiso [2022] where the Judges of Appeal cited with approval Denning J, in Miller vs Minister of Pensions [1947] 2 All ER 372, to submit that the onus was on the Plaintiff to prove on a balance of probabilities that she had a genuine title to the suit land and that the registration procured by the Defendants in favour of the 1st Defendant and later in favour of the 5th and 6th Defendants was obtained by fraud. It was their submission that the Plaintiff had failed to discharge that burden on account of the evidence adduced.

75. That whilst there was no dispute that land parcel number L.R No. 631/1590 Kericho Municipality was converted to Kericho Municipality/Block 4/69, what was in dispute was whether the said land was also the Un-surveyed Residential Plot-Kericho Municipality allegedly allocated to the Plaintiff vide the Allotment letter of 1st February, 1996 as per Pf exh4. That on cross-examination by the Counsel for the 1st Defendant, PW2 confirmed that in the said Allotment Letter, Plan No. 22/93/24 was mentioned wherein the suit land was shown edged red but he never produced the same in evidence hence there was no proof that such a parcel of land exists and where it was situated. That in the contrary, there was sufficient evidence that land parcel number L.R No. 631/1590 Kericho Municipality existed as confirmed by the Pf exh 30 which is a copy of certified title document also produced as Df exh 7 measuring 0.2834 hectares under Grant No. 72/35 as confirmed by the attached Survey Plan No. 210051, with payable rent of Kshs. 5,600/= and stand premiums of Kshs. 28,000/=.

76. That the said land was later converted to Kericho Municipality/Block 4/69 on 28th June, 2006 and later sold to the 5th and 6th Defendants as evidenced by the Sale of Land Agreement dated 7th July, 2006 produced as Df exh 3. That the Plaintiff's case was that by the aforementioned Pf exh4, the 2nd Defendant offered the land parcel known as Un-surveyed Residential Plot-Kericho Municipality that measured 0.22 ha under Survey Plan No. 22/93/24 and Grant No. 21350/XXIX with a rent of Kshs. 4,400/= and Stand Premium of Kshs. 22,000/=for a term of 99 years commencing 1st February, 1996. That the obvious discrepancies were evidence enough that the Plaintiff was referring to a completely different parcel of land which might not even exist on the ground.

77. That the evidence on record did not only show that the two parcels of land were different, but also that Un-surveyed Residential Plot-Kericho Municipality might only exist on paper but in the unlikely event that the same existed, nothing prevented the Plaintiff from calling a surveyor as a witness to confirm the same in light of the existing discrepancies alluded to above. That the length of time the instance matter took to conclude without the Plaintiff making any attempt to call a surveyor as a witness showed that the Plaintiff was apprehensive that had the surveyor been called, he/she would have confirmed the inexistence of the Un-surveyed Residential Plot-Kericho Municipality.

78. It was their further submission that the 1st Defendant, being the first registered proprietor, had obtained an indefeasible title which could not be vitiated, hence through the purchase transaction pleaded by the 5th and 6th Defendants, the said Defendants had also obtained a good title to the suit land to which the Plaintiff could not assert rights over. To buttress the above assertion, the 5th and 6th Defendants' reliance was hinged on the provisions of Sections 24 (a) and (b), 25(1) and 26 (1) of the *Land Registration Act*.

79. The 5th and 6th Defendants further placed reliance on the definition of Fraud from Black's Law Dictionary, 10th edition, Bulletin, Leake & Jacobs, Precedent of Pleadings, 13th edition. At pg 427 and the decided case of Vijay Morjaria vs. Nansingh Madhusingh Dardar & Another [2000] eKLR to submit that it was only on account of fraud or misrepresentation that the title to the suit land could be impeached. That fraud on the part of a person obtaining registration of a land parcel in its name, like the 1st, 5th and 6th Defendants herein, ought to have included a proved knowledge of existence of the Plaintiff's interest, which interest, the said Defendants had jointly or severally knowingly and wrongfully defeated by the registration. That the Plaintiff neither provided such evidence nor proved that the Defendants were a party to the alleged fraud or illegality wherein they had un-procedurally obtained the title to the suit land. Further, that the Plaintiff never sought the intervention of the Police, the Ethics and Anticorruption Commission or the National Land Commission to forestall the registration of the suit land in the names of the 1st, 5th and 6th Defendants on account of fraud, or to have them prosecuted for the criminality in it.

80. That it was evident from the pleadings filed by the Plaintiff that she had failed to heed to the requirement of the law as regards specifically pleading fraud and distinctively providing particulars as she had just presented a generality of superfluous allegations which was insufficient for the court to make a finding therefrom. Reliance was placed on the decided case of Kinyanjui Kamau v George Kamau [2015] eKLR. That the onus was on the Plaintiff to prove, on a standard higher than on a balance of probabilities, that the title to the suit land was obtained by fraud or illegality for which the Defendants had been parties to. That the Plaintiff had failed to even discharge the said burden on the lower standard of a balance of probabilities on account of the evidence she adduced in court, hence her allegations of fraud be dismissed as mere rhetoric.

81. That the court should take cognizance of the fact that great care must be taken by a party in pleading allegations of fraud and dishonesty, in particular, the pleader must be sure that there is sufficient

evidence to justify the pleadings. Further, that allegations of illegality, irregularity and fraud must not be casually thrown in pleadings as was done by the Plaintiff since they were serious in nature and the accused parties deserved to be informed of the same in sufficient detail to conclusively respond thereto. Reliance was placed on a combination of decisions in the case of Central Bank of Kenya vs. Trust Bank Ltd & 4 Others Civil Appeal No. 215 of 1996, Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another [2016] eKLR and Marium Njeri Njoroge & Another vs. June Ndegwa & Another [2022] eKLR where the court cited with approval the case of Paragon Finance PLC vs. D B Thakerar & Co 1999 1 ALL ER 400.

82. That from the foregoing, the 5th and 6th Defendants were the legal owners of the suit land herein being the bona fide purchaser for value without notice.as was held in the decided case of Katende vs. Haridar & Co. Ltd 920080 2 E.A at pg. 173 cited with approval in Lawrence Mukiri vs. Attorney General & 4 Others [2013] eKLR. That they had proved vide Df exh 4, a Certificate of Official Search dated 28th May, 2009 and Df exh 5, a Certificate of Lease, that they held a valid Certificate of title. That as proved by the Sale of Land Agreement dated 7th July, 2006 produced as Df exh 3, they had purchased the suit land in good faith for a valuable consideration of Kshs. 1,600,000/= from the 1st Defendant who also held a valid title as confirmed from the due diligence they had conducted and as proved vide a Certificate of Search dated 5th July, 2006 herein produced as Df exh 1.

83. Reliance was placed on the provisions of Section 30 (3) of the *Land Registration Act* to submit that no allegation of fraud in obtaining the title to the suit land had been proved, or that the 5th and 6th Defendants had notice of the same or were a party to it. Further that the 1st Defendant was registered as the proprietor of the suit land on 1st February 1996 as evidenced by the Pf exh 30 also produced as Df exh 7, while the Plaintiff was yet to be granted any title 27 years down the line since the only title that the said Plaintiff had had been extinguished via a Consent dated 20th April, 2010. That it was trite law that when there were two competing titles, the first in time would prevail. Reliance was place on a combination of decisions in the case of Wreck Motors Enterprises vs. The Commissioner of Lands and Others Civil Appeal No. 71 of 1997 and Gitway Investment ltd b Tajmal Ltd & 3 Others [2006] eKLR.

84. They thus urged the court to find that the 1st Defendant's title document was the first in time and should prevail in the unlikely event that the court finds that there had been no evidence called by the Defendants to challenge the Plaintiff's title.

85. Their submission was that in view of the foregoing, the Plaintiff's case ought to be dismissed with costs. However, in the event that the court grants the Plaintiff the prayers sought in her plaint, the 5th and 6th Defendants in their Counterclaim prayed for damages against either the Plaintiff and/or the 1st, 2nd, 3rd and/or 4th Defendants which damages should take into consideration the current value of the suit land and the improvements thereon and the fact that property appreciates in value, being Kshs. 42,000,000/= as proved by a Valuation Report produced as Df exh 6. That they also be awarded interest as may be at the time of determination of the instant matter plus costs of the Counterclaim.

2nd and 4th Defendants' submissions

86. The 2nd and 4th Defendants, vide their undated Submissions filed on 29th November, 2023 framed one issue for determination to wit; whether there was fraud in the allocation of the suit property to the Plaintiff (sic).

87. They then proceeded to submit that the Letter of Allotment dated 1st February, 1996 issued to the Plaintiff was merely an offer subject to acceptance and did not create any proprietorship in favour of the Plaintiff. To buttress the above assertion, reliance was placed on the decision in the case of D. Joseph N.K. Arap Ng'ok v Justice Moijo Ole Keiwa & Others C.A. 60/1997.

88. That the Plaintiff was required to pay the sum of Kshs.32,963/- within 30 days from the date of the said Letter of Allotment wherein she had paid the said sum on 16th April, 1996, which period was beyond the 30-days stipulated period. That the allotment offer had to be accepted within the stipulated period otherwise it would lapse with effluxion of time. The Plaintiff did not meet the said condition. Reliance was placed in the decided case of Bubaki Investment Company Ltd vs. National Land Commission & 2 others [2015] eKLR to submit that the Plaintiff having failed to accept the offer within the stipulated time and/or to seek any extension of time to abide by the stipulated conditions as per the Letter of Allotment, she did not acquire any interest in the suit land. That the subsequent acts by the Defendants in dealing with the suit land therefore could not be fraudulent.

89. The 2nd and 4th Defendants also relied on the Vijay Morjaria case (supra) to submit that to succeed in a claim of fraud, the Plaintiff needed to plead and particularize the same by laying out water tight evidence which she had failed to discharge. Further, that by virtue of non-compliance with the terms of the Letter of Allotment, the Plaintiff did not have proprietary interest to claim any fraud arising thereof.

90. Further reliance was placed in the decided case of Torino Enterprises Limited vs. Attorney General (Petition 5 (E006) OF 2022) [2023] KESC 79 (KLR) to stress that it was settled law that an allotment letter was incapable of conferring interest in land, being nothing more but an offer, awaiting the fulfilment of conditions stipulated therein.

91. In conclusion, the 2nd and 4th Defendants reiterated that the Plaintiff's claim on fraud was unfounded and the court should dismiss it in entirety with the orders sought in the Amended Plaint dated 30th March, 2011.

1st Defendant's submissions

92. In their submissions dated 4th December 2023 and filed on 6th December 2023, the 1st Defendant adopted the issues for determination as framed by the 5th and 6th Defendants but added one issue for determination to wit;. Can an allotment Letter pass a good title?

93. The 1st Defendant placed reliance on Torino Enterprises Limited case (supra) to submit that the Allotment Letter in possession of the Plaintiff did not cloth her with the right to sue the 1st Defendant since the said 1st Defendant had proved through documentary evidence that its land was different from the one allotted to the Plaintiff. The 1st Defendant thus submitted that in the totality of the testimony and evidence adduced, the court ought to conclude that the Plaintiff's case was for dismissal with costs.

Determination.

94. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law. It must be remembered that prior to the proceedings herein, initially the Plaintiff had filed this suit as Kericho High Court Civil Suit No. 45 of 2002 wherein she had obtained an ex-parte Judgement in her favour against the 1st Defendant on 19th April 2007. Pursuant an application by the 1st Defendant, by consent the aforementioned ex-parte judgement and ex-parte proceedings thereto had been set aside vide a consent dated the 20th April 2010. Subsequently the 1st Defendant had been granted leave to join the 5th and 6th Defendants herein. In essence thereof the consent had placed the parties herein in the initial position they had been at the time of filing suit in the year 2002.

95. This matter was initially filed at the Kericho High Court as Civil Suit No. 45 of 2002 before it was transferred to Kericho Environment and Land Court, then to the Kisii Environment and Land Court

before it subsequently found its way back to this Court wherein the 2nd, 3rd and 4th Defendants' case had been marked as closed for failing to avail their witnesses.

96. It is not lost however that although the 2nd and 4th Defendants filed submissions, the same would not be considered by the court in the absence of evidence tendered because submissions were not evidence and nor could they be a substitute therefor. Indeed the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR had held that;

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

97. The gist of the matter arising herein revolves around the registered parcel of land L.R No. Kericho Municipality/Block 4/69. The bone of contention being the identification of its legally registered proprietor. Briefly, the Plaintiff's case was that by a Letter of Allotment Ref. No. 21350/XXIX dated 1st February, 1996 she had been offered a Grant of Parcel of Land known as Un-Surveyed Residential Plot-Kericho Municipality on survey plan No. 22/93/24 measuring 0.22 hectares for a term of 99 years from 1st February, 1996. That she had accepted the said offer and on or about the 16th April, 1996 obtained a Banker's cheque No. TBK/BC 005515 for Kshs. 32,963/= from Trust Bank Ltd, Kericho Branch in payment of the charges prescribed in the letter of allotment. The payment was receipted by the Department of Lands on 16th May, 1996 vide official Receipt No. D 448477. That subsequent to the said payment, the Director of Survey issued a Deed Plan No. 210051 being L.R No. 631/1590 Kericho Municipality for the said land. What followed was that at an unknown date, the 1st and 2nd Defendants fraudulently caused the land to be registered in the name of the 1st Defendant.

98. The Plaintiff's case was that the registration of the said land to the 1st Defendant was fraudulent. She particularized the acts of fraud by the 1st and 2nd Defendants as follows;

i. Forging a copy of Receipt No. D448477 to read the name of the 1st Defendant opening of file No. 184200 with regard to L.R No. 631/1590 Kericho Municipality.

ii. Opening file No. 184200 in the name of the 1st Defendant as allottee of L.R No. 631/1590 Kericho Municipality without payment of stand premium prescribed in the letter of allotment.

iii. Converting Deed Plan No. 210051 for L.R No. 631/1590 Kericho Municipality in favour of the Plaintiff into the 1st Defendant benefits.

iv. Issuing title document over L.R No. 631/1590 Kericho Municipality to the 1st Defendant by use of payments made by the Plaintiff.

v. Allotting L.R No. 631/1590 Kericho Municipality to the 1st Defendant after the Plaintiff had paid the stand premium for the same.

99. That subsequently, pursuant to the change in the Land Registration Regime from Registration of Titles Act to Registered *Land Act*, the suit land had been converted from L.R No. 631/1590 Kericho Municipality to L.R No. Kericho Municipality/Block 4/69 after which the 4th Defendant through its agent, the Kericho District Land Registrar, had issued the 1st Defendant with a Certificate of Lease over the said land on or about 5th July 2006 wherein on or about the 27th May, 2009, the said 1st Defendant

had transferred the land to the 5th and 6th Defendants as proprietors in common. That subsequently on or about the 23rd February, 2010 pursuant to a court's order, the 4th Defendant through its agent the Kericho District Land Registrar, had issued a certificate of lease to the Plaintiff thereby cancelling the title issued to the 5th and 6th Defendants.

100. The 1st Defendant's case on the other hand had been that in the year 1996, its director had been allotted land parcel No. Kericho Municipality LR 631/1590 measuring 0.2834 hectares which land was under survey plan No.210051. That the said land was Grant No.72/35 with an annual rent of Kshs.5,600/=. That upon receiving the Grant, its directors had converted the same to title No. Kericho Municipality / Block 4/69 on the 28th June, 2006 and thereafter sold and transferred it to the 5th and 6th Defendants vide a sale agreement of 7th July, 2006. That the Plaintiff's suit was statutory time barred.

101. Lastly, the 5th and 6th Defendants' case was that they were bona fide purchasers for value of parcel of land No. Kericho Municipality /Block 4/69 having jointly purchased the same on 7th July, 2006 from the 1st Defendant who was the sole registered proprietor. That they had obtained a good title over the land to which the Plaintiff could not assert a right over.

102. Having given a summary of the matter in issue, I find the several issues arising for determination thereto as follows;

i. Whether the parcel of land No. Un-Surveyed Residential Plot-Kericho Municipality on survey plan No. 22/93/24 measuring 0.22 hectares is the same as No. Kericho Municipality LR 631/1590 measuring 0.2834 hectares which land was under survey plan No.210051.

ii. If the answer to (i) above is positive, whether there had been two competing allotment letters.

iii. Whether the Plaintiff had met the conditions stipulated in the letter of Allotment.

iv. Whether there was fraud in the registration of the suit land to the 1st Defendant.

v. Whether the 5th and 6th Defendants are bona fide purchasers for value whose title cannot be defeated.

vi. Whether the Plaintiff's suit is statutory time barred.

vii. Whether the Plaintiff is entitled to the reliefs sought in her amended Plaint.

viii. Whether the 5th and 6th Defendants are entitled to prayers sought in their counterclaim.

ix. Who should bear the costs of the suit and counterclaim.

103. On the first issue for determination as to whether parcel of land No. Un-Surveyed Residential Plot-Kericho Municipality on survey plan No. 22/93/24 measuring 0.22 hectares is the same as No. Kericho Municipality LR 631/1590 measuring 0.2834 hectares which land was under survey plan No.210051, the evidence on record is that whereas the Plaintiff had been issued with an allotment letter herein produced as Pf exh 4(a), on the 1st February, 1996 to land No. Un-Surveyed Residential Plot-Kericho Municipality measuring 0.22 hectares. There had been annexed thereto the letter of allotment, a copy of the map she had on the 27th February 2020 produced, as Pf exh 4(b) and which copy is now missing from the court file.

104. However from the contents of a letter dated the 4th November 1997 addressed to the Plaintiff by the Director of Survey and copied to the Commissioner of Land, the herein produced as Pf exh 13, it was clear that a deed Plan No. 210051 for LR No. 631/1590 had been issued to the commissioner of lands on 21st November 1996 computation No 33747 for FR 276/129 which contained the letter of

allotment issued to the Plaintiff herein. I therefore find that No. Un-Surveyed Residential Plot-Kericho Municipality was the same land as No. Kericho Municipality LR 631/1590.

105. That having been said, the next issue for determination would be whether there had been two competing Letters of Allotment. The 1st Defendant's evidence as adduced by its director DW2, that she had been issued with an allotment letter to No. Kericho Municipality LR 631/1590 measuring 0.2834 hectares which land was under survey plan No.210051. However there had been no documentary evidence in the form of the alleged Letter of Allotment to support her assertion.

106. In the case of M'Ikiara M'Rinkanya & Another –v- Gilbert Kabeere M'Mbijiwe, (1982-1988) 1KAR 196, the court held that where there was a double allocation of land, the first allotment would prevail. That therefore there was no power to allot the same property again. (See also Kariuki –v- Kariuki (1982-88) KAR 26/79 and Otieno and Matsanga, (2003) KLR 210.

107. In a letter dated 27th July, 2001 from the Permanent Secretary, Ministry of Lands and addressed to the Commissioner of Lands herein produced as Pf exh18, it is clear that although this had been a case of;

> "……double allocation which led to the opening of two files Nos. 181543 and 184200. It appears that there was an error and the second file was opened after the first allottee Mrs. Patel had already accepted the allotment and paid for the plot vide cheque No. 005515."

108. The 1st Defendant did not produce any receipt or documents in relation to acceptance of their alleged allotment of the suit land and no evidence had been laid as whether or not the conditions stated in their alleged letter of Allotment had been met. In the absence of evidence that the 1st Defendant had been issued letters of allotment, I am satisfied that indeed there had been no two competing Letters of Allotment and the issue of double allocation does not arise.

109. The next issue for determination herein is whether the Plaintiff had met the conditions stipulated in the Letter of Allotment. I find that this aspect threw a spanner into the works. It is clear from the evidence on record as well as documentary evidence herein produced as Pf exh 4(a) that the Plaintiff had been offered Un-surveyed Residential Plot- Kericho Municipality or the suit parcel of land vide an allotment letter dated 1st February 1999. 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 1st February 1996.

110. Pf exh 5 the banker's cheque clearly showed that the Plaintiff had made the payments on the 16th April 2017 which was beyond the stipulated period of 30 days. In order for the allotment letter to have 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. In the present case, upon lapse of the offer contained in the allotment letter, the land was free to be allotted to someone else and the Plaintiff did not have any interest thereon.

111. In Ali Mohamed Dagane (granted Power of Attorney by Abdullahi Muhumed Dagane,suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others [2021] eKLR my brother Justice E. C. Cherono after considering various decisions by other courts had held as follows;

> "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. (Emphasis mine) 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."

112. It is trite law that a letter of allotment is not proof of title as it is only a step in the process of allocation of land and that Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter.

113. In Joseph Arap Ng'ok –vs- Justice Moijo Ole Keiwua NAI Civil Application No. 60 of 1997 the Court of Appeal observed as follows:

> 'It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document (my emphasis) pursuant to provisions in the Act under which the property is held.'

114. Indeed evidence had been led by the Plaintiff on how upon being allocated the suit land, she had proceeded to make payments, as evidenced during the trial, of the charges prescribed in the letter of allotment and which payment had been receipted by the Department of Lands on 16th May, 1996 vide official Receipt No. D 448477. Indeed the Plaintiff continued paying for and receiving demand notices for the payment of Land Rates and Land Rent as late as the year 2017 as evidenced by the Pf exh 35-46 and 46-64 being Land Rate and Rent Demand Notices as well as the Pay-in-slips for the land rates and rent, however I find that were the stand premium made within the stipulated period as deposed in clause 2 of the Latter of allotment, I would not have hesitated to find that she was entitled to a legitimate expectation in her favour which I now find nought by virtue of the finding that her allotment to the land was now void.

115. An issue then arises as to whether there was fraud in the registration of the suit land to the 1st Defendant. As earlier stated, it is not enough to dangle the instrument of title as proof of ownership more so when the same was challenged. The 1st Defendant's evidence was that having been issued with an allotment letter in year 1996 to land parcel No. Kericho Municipality LR 631/1590, its director had further been issued with the Grant which she had converted to No. Kericho Municipality/Block 4/69, herein produced as Df exh 2, on the 28th June, 2006.

116. The question to ask was how the 1st Defendant had acquired the title in the absence of a Letter of Allotment, having based its interest in the suit land on the foundation of the said allotment letter? The Plaintiff has answered this question by contending that the said title deed was fraudulently obtained.

117. In R.G Patel vs Lalji Makanji 1957 E.A 314, the Court of Appeal stated as follows:

> " Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required".

118. In the case of Arthi Highway Developers Ltd vs West End Buthery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 eK.L.R), the Court of Appeal cited the following passage from Bullen & Leake precedents pleadings 13th edition at Page 427:

> " The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of ..... It is not allowable to leave fraud to be inferred from the facts pleaded

and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved ..... General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice".

119. The Plaintiff having distinctively pleaded particulars of fraud, as against the 1st and 2nd Defendants, the next step was for her to prove those allegations to the required standard which allegations I find have been proved by the mere fact that the 1st Defendant neither produced in evidence any Letter of Allotment, payment receipt, Surveyors Letter or Letter from the Commissioner of land or any document whatsoever explaining how the suit land had been registered in its name. There had also been no document of proof of acceptance by payment of the sum prescribed in its alleged letter of Allotment.

120. It is also evident from the documentary evidence herein produced as Df exh 1, that whilst the matter was pending in court vide Kericho High Court Civil Suit No. 45 of 2002, and upon the change of the land registration regime, the 2nd and 4th Defendants had issued the Registered *Land Act* title over the suit land to the 1st Defendant on 5th July, 2006, there having been notification by the Hon the Attorney General to the Permanent Secretary, Ministry of Land and Settlement of the Plaintiff's intention to sue vide its letter dated 15th February, 2002 (Pf exh23) and when the 2nd Defendant had already entered appearance and filed its Statement on the said suit.

121. As stated earlier, there having been no evidence of an allotment letter or payment therein, the 2nd and 4th Defendants had prepared and issued to the 1st Defendant a Grant (Pf exh 10, Df exh 7) under the Registration of Titles Act using information contained in a letter dated the 4th November 1997 which was addressed to the Plaintiff by the Director of Survey and copied to the Commissioner of Land, herein produced as Pf exh 13. No evidence had been adduced that the Deed Plan number 210051 prepared on 21st November, 1996 earlier issued to the Plaintiff had been withdrawn or cancelled by the Director of Surveys.

122. The 1st, 5th and 6th Defendants had also claimed to have been paying the land rent and rates over the suit land yet there had been no production of any evidence in support thereof. In essence hereof, no evidence had been adduced of how the 1st Defendant had acquired the suit land apart from the fact that they had in their possession a Certificate of Official Search and the Certificate of Lease in their name.

123. As was held by the Court of Appeal in Munyu Maina vs. Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR:

> " Where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register"

124. The 1st Defendant having failed to discharge its burden of proving that the root of the acquisition of its title to the suit land was legal, formal and free from any encumbrance, I find that its registration to L.R No. Kericho Municipality/Block 4/69 formerly known as L.R No. 631/1590 Kericho Municipality was irregularly obtained.

125. On the issue as to whether the 5th and 6th Defendants are bona fide purchasers for value whose title cannot be defeated, the 5th and 6th Defendants claimed that they were bona fide purchasers for value having purchased the suit land from the 1st Defendant for Kshs. 1,600,000/=. That they acquired a valid and legal title, having carried out all the necessary due diligence and paid valuable consideration

for the purchase of the suit land hence their title was indefeasible. That they carried out search and confirmed that indeed the land was registered in the name of the 1st Defendant and further that the people living around the suit land also confirmed that the same belonged to the 1st Defendant.

126. The Black's Law Dictionary 9th Edition defines a bona fide purchaser as:

> " One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

127. The Court of Appeal in Samuel Kamere vs. Lands Registrar, Kajiado Civil Appeal No. 28 of 2005 [2015] eKLR observed as follows:

> " ...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a VALID and LEGAL title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property..."

128. It therefore follows that to establish whether the 5th and 6th Defendants are bona fide purchasers for value, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in the instant matter. Thus having found as above that the 1st Defendant's title to L.R No. Kericho Municipality/Block 4/69 formerly known as L.R No. 631/1590 Kericho Municipality was irregularly obtained, the said 1st Defendant did not have a good title to pass to the 5th and 6th Defendants.

129. 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, held 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."

130. In the Dina Management Limited vs. County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), (supra) the Supreme Court had observed as follows:

> ''The title or lease was 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 could not be held as indefeasible. The first allocation having been irregularly obtained, the former President had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant.''

131. From the foregoing, I find that the 5th and 6th Defendants are not bona fide purchasers the 1st Defendant's title having been irregularly issued as nothing begets nothing. This was the tenure of the opinion by the Privy Council Lord delivered by Denning in the case of Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, at page 1172 (1):

> ''If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every

proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

132. As to Whether the Plaintiff's suit is statutory time barred as alleged by the 1st, 5th and 6th Defendants, the court is mindful of the legal attribution to the doctrine of Statutory limitation on an action to recover land in Kenya which is embodied in Section 7 of the *Limitation of Actions Act*, (Cap 22) in these terms:

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person".

133. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiff having been allotted the suit land on the 1st February 1996 she could only sue to recover it from the Defendants, but only if she did so within twelve years after the allotment.

134. I beg to differ, it is on record that the Plaintiff was on the 1st February 1996 issued with a letter of allotment to the suit land, thereafter a Grant had been also been issued to the 1st Defendant's directors in the same year, who had converted the same to title No. Kericho Municipality /Block 4/69 on the 28th June, 2006 and thereafter sold and transferred it to the 5th and 6th Defendants vide a sale agreement of 7th July, 2006.This suit had been instituted vide a Plaint dated 7th June 2002 which makes it approximately 6 years after the cause of action as against the 1st defendant and 4 years as against the 5th and 6th Defendants respectively and therefore short of the 12 years as is stipulated by the law. This line of argument therefore fails.

135. On whether the Plaintiff is entitled to the reliefs sought in her amended Plaint, the answer is in negative for reasons that having found as herein above that the she had not met the conditions stipulated in the Letter of Allotment, to wit compliance with the payment of stand premium and ground rent within the prescribed period, the land was free to be allotted to someone else and the she (Plaintiff) did not have any interest thereon. (see the case of Joseph Arap Ng'ok supra)

136. My decision on the question as to whether the 5th and 6th Defendants are entitled to prayers sought in their counterclaim to wit that in the event the court grants the original Plaintiff the prayers sought, then they would be entitled to damages against either the Plaintiff and/the 1st, 2nd, 3rd and/or 4th Defendants at the current value of the suit land and the improvements therein plus interest as may be at the time of determination of the suit.

137. It is not lost that when the exparte judgement was set aside, through a consent dated 20th April 2010 between the Plaintiff and the 1st Defendant, in essence thereof the consent had placed the parties herein in the initial position they had been at the time of filing suit in the year 2002 and therefore this court is to be functus officio on the issue of any decree that may have arisen within the ex-parte judgment. To this effect therefore, having found that the 1st Defendant had no good title to pass, the 5th and 6th Defendants cannot now be said to seek damages against the Plaintiff who had no privity of contract with them and neither could they file a counterclaim against their co-defendants as they cannot create a cause of action in the Plaintiff's case. This counterclaim is therefore rejected.

138. In the end, I find that both the Plaintiffs suit as well as the 5th and 6th Defendants' counterclaim have not been proved on a balance of probabilities and are hereby dismissed.

139. Each party to bear their costs

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 8TH DAY OF FEBRUARY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE