



**Shah (As the personal representative of the Estate of Kantibhai M Pate) v Attorney General & another; Prime Bank Limited (Interested Party) (Environment & Land Case 428 of 2007) [2024] KEELC 5912 (KLR) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5912 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 428 OF 2007  
JO MBOYA, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**PRITIBALA MILAN SHAH (AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF KANTIBHAI M PATE) ..... PLAINTIFF**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**VALLEY VIEW ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**PRIME BANK LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. The instant suit was commenced vide Complaint dated the 4<sup>th</sup> June 2001 and wherein the Plaintiff, namely, Kantibhai Maghanbhai Patel, now deceased, sought for various reliefs. Nevertheless, the Complaint under reference was thereafter amended culminating into the amended Complaint dated the 18<sup>th</sup> March 2022 and in respect of which the Plaintiff has sought for the following reliefs;
  - i. A declaration that the Defendants subsequent allotment and issue of Grant No. I.R.67995/1, L.R. No. 209/ 12909 and consequent depriving of the Plaintiff of the land was fraudulent and/or by error and/or a nullity.
  - ii. In the alternative to prayer (a) above, damages in the sum of Kshs,200,000,00.00 being the market value of the land as at August November 2021.
  - iii. Such other or further relief as may just and appropriate in the circumstances.
  - iv. Interest on (b) at commercial rates to wit 24% per annum.



- v. Costs of this suit.
2. Upon being served with the original Plaintiff, the 1<sup>st</sup> Defendant duly entered appearance on the 15<sup>th</sup> October 2001; and thereafter filed a statement of defence on the 27<sup>th</sup> February 2002. On the other hand, the 2<sup>nd</sup> Defendant entered appearance on the 26<sup>th</sup> October 2001 and thereafter filed a statement of defence on the 6<sup>th</sup> November 2001.
3. Suffice it to point out that the 2<sup>nd</sup> Defendant thereafter amended her statement of defence culminating into the filing of the amended statement of defence dated 24<sup>th</sup> March 2022 and wherein the 2<sup>nd</sup> Defendant denied the claims at the foot of the amended Plaintiff. Furthermore, the 2<sup>nd</sup> Defendant maintained that the suit property was lawfully allocated to and thereafter registered in her name.
4. During the pendency of the suit, the 2<sup>nd</sup> Defendant sought for and obtained a banking facility from Prime Bank Limited. In this regard, Prime Bank Limited thereafter sought for and obtained leave to be joined as an interested party, with a view to vindicating what same [interested party] contended to be her lawful rights to and in respect of the suit property.
5. Moreover, upon the grant of leave, the interested party duly proceeded to and filed a statement of defence dated the 5<sup>th</sup> December 2022 and list and bundle of documents. For coherence, the list and bundle of documents on behalf of the interested party are also dated the 5<sup>th</sup> December 2022.
6. After prolonged delay, spanning more than 21 years, the suit beforehand came up for pretrial directions on the 31<sup>st</sup> May 2023, whereupon the parties confirmed that same [parties] had filed and exchanged the requisite pleadings, list and bundle of documents and witness statement. In this regard, the parties confirmed that the suit was therefore ready for hearing.

### **Evidence By The Parties’:**

#### **a. Plaintiff’s Case:**

7. The Plaintiff’s case is premised on the evidence of two [2] witnesses, namely, Pritibhala Milan Shah [who is the legal administratrix of the original Plaintiff, now deceased] and Jacob Gitonga Kithaka, who testified as PW1 and PW2, respectively.
8. It was the testimony of PW1 [Pritibhala Milan Shah] that same is the legal administratrix of the Estate of Kantibhai M Patel, now deceased. Besides, the witness averred that by virtue of being the administratrix of the Estate of the said deceased same [witness] is conversant with the facts of the instant matter.
9. Furthermore, the witness averred that same has since recorded a witness statement in respect of the matter before the court. In this regard, the witness adverted to the witness statement dated the 27<sup>th</sup> May 2015 and which witness statement the witness sought to adopt as her evidence in chief. For good measure, the witness statement dated the 27<sup>th</sup> May 2015 was thereafter adopted and constituted as the evidence in chief of the witness.
10. Additionally, the witness averred that same had also filed a list and bundle of documents dated the 27<sup>th</sup> May 2015, containing 21 documents. In this regard, the witness sought to adopt and produce the said documents as exhibits before the court. Suffice it to point out that the documents at the foot of the list dated 27<sup>th</sup> May 2015 were thereafter produced and admitted before the court as exhibits P1 to P21, save that document number P19 was marked as PMFI 19.
11. On the other hand, the witness averred that same had equally filed a supplementary list and bundle of documents dated the 24<sup>th</sup> November 2021. For good measure, the witness stated that the list under



- reference only had one document and which same [witness] sought to tender and produce before the court.
12. Be that as it may, the document under reference being an expert document [valuation report] same was marked as PMFI 22.
  13. Other than the foregoing, the witness adverted to the amended Plaintiff dated the 18<sup>th</sup> March 2022 and the verifying affidavit attached thereto. Suffice it to point out that the witness implored the court to adopt the contents of the amended Plaintiff and thereafter to grant the reliefs sought thereunder.
  14. On cross examination by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that same [witness] did not personally participate in the transaction leading to the allotment of the property before the court. In particular, the witness averred that same [witness] only took over the conduct of the matter upon the death of her [witness] father.
  15. It was the further testimony of the witness that same [witness] was appointed as the legal administratrix of the estate of Kantibhai Maghanbhai Patel on the 10<sup>th</sup> December 2007. Nevertheless, the witness averred that same has not brought before the court a copy of the Grant of probate.
  16. Whilst under further cross examination, the witness averred that her late father was allocated the disputed plot vide letter of allotment dated the 5<sup>th</sup> June 1995. Besides, the witness averred that the disputed property was allocated as a proposed extension to L.R No. 8762/2- Nairobi, which belongs to and is registered in the name of the deceased.
  17. In addition, the witness averred that the land in question is landlocked. Nevertheless, the witness added that the land in question is currently under the use by the Plaintiff.
  18. On cross examination by learned counsel for the 2<sup>nd</sup> Defendant, the witness stated that the property in dispute has a certificate of lease. Furthermore, the witness added that the land in question is currently registered in the name of the 2<sup>nd</sup> Defendant.
  19. It was the further testimony of the witness that the land in question was allocated to and in favour of her father, now deceased. Besides, the witness added that her father, now deceased, was issued with a letter of allotment. In this regard, the witness adverted to the letter of allotment dated the 5<sup>th</sup> June 1995.
  20. On the other hand, the witness averred that same has also seen a letter of allotment issued in favour of the 2<sup>nd</sup> Defendant. However, the witness stated that the letter of allotment in favour of the 2<sup>nd</sup> Defendant is different.
  21. Whilst under further cross examination, the witness stated that her father, now deceased was never issued with a certificate of lease , or title, over and in respect of the disputed property.
  22. On cross examination by learned counsel for the interested party, the witness averred that same [witness] is one of the administrators of the estate of the deceased. Nevertheless, the witness added that the Estate is being administered by two persons.
  23. It was the testimony of the witness that the Plaintiff's case is premised on the letter of allotment which was issued on the 5<sup>th</sup> June 1995. Nevertheless, the witness clarified that no certificate of lease was ever issued to and in favour of the original Plaintiff, now deceased.
  24. On the other hand, the witness averred that her late father [now deceased] engaged and involved one Enock Tuitok to assist him [deceased] in procuring and obtaining the certificate of title in respect of the suit property. However, the witness clarified that no certificate of title was ever issued.



25. It was the further testimony of the witness that same [witness] is aware that a certificate of title was issued in favour of the 2<sup>nd</sup> Defendant. However, the witness added that despite being aware that the certificate of title was issued in favour of the 2<sup>nd</sup> Defendant, same [witness] has not sought for an order for cancellation or revocation of the existing title in respect of the suit property.
26. On further cross examination, the witness averred that same is also aware that the suit property is currently charged to and in favour of the interested party. At any rate, the witness averred that same also retained a valuer to undertake valuation over and in respect of the suit property.
27. On re-examination, the witness stated that the letter of allotment which was issued in favour of the Plaintiff [now deceased] is dated the 5<sup>th</sup> June 1995. On the other hand, the witness averred that the letter of allotment in favour of the 2<sup>nd</sup> Defendant was issued in October 1995. In this regard, the witness stated that the letter of allotment in favour of the Plaintiff [now deceased] preceded the letter of allotment in favour of the 2<sup>nd</sup> Defendant.
28. The second witness who testified on behalf of the Plaintiff is Jacob Gitonga Kithaka. Same testified as PW2.
29. It was the testimony of the witness [PW2] that same is a registered valuer. Further, the witness averred that his registration number is 444. Besides, the witness also stated that same is also a registered and practising estate agent.
30. In addition, the witness averred that currently same [witness] is working at Gimco Ltd which is a firm engaged in valuation. Furthermore, the witness averred that same was instructed to undertake valuation over and in respect of the suit property. In this regard, the witness stated that same thereafter proceeded to and undertook valuation, culminating into the preparation of a valuation report dated the 22<sup>nd</sup> November 2021.
31. On the other hand, the witness thereafter sought to produce the valuation report as an exhibit. There being no objection to the production of the valuation report, same [valuation report] was produced and admitted as exhibit P22.
32. It was the further testimony of the witness that same accessed the suit property through an adjacent plot next to the suit property. Furthermore, the witness averred that the adjacent property belonged to the Plaintiff.
33. On cross examination by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that the valuation was carried out on the 15<sup>th</sup> October 2021. Furthermore, the witness added that the purpose of the valuation was to determine the market value of the property.
34. It was the further testimony of the witness that same [witness] deployed the comparative market approach in a bid to arrive at the value of the suit property. However, the witness admitted that same has not enumerated the comparable properties which were taken into account in ascertaining the market value of the suit property.
35. Whilst under further cross examination, the witness averred that the suit property is landlocked. Nevertheless, the witness added that same accessed the suit property through L.R No. 209/8762/2.
36. On cross examination by learned counsel for the 2<sup>nd</sup> Defendant, the witness averred that same was retained and engaged to undertake valuation of the suit property by Mr. Shah. Furthermore, the witness added that the purpose of the valuation was to ascertain the market value thereof.



37. On cross examination by learned counsel for the Interested Party, the witness stated that same [witness] was instructed to carryout inspection of the suit property. Furthermore, the witness averred that it is him [witness] who signed the valuation report.
38. Whilst still under cross examination, the witness averred that same proceeded to and ascertained the status of the land in question. However, it was the testimony of the witness that same [witness] has not availed a copy of the official search in respect of the suit property.
39. Be that as it may, the witness testified that even where the property is encumbered, the encumbrance would not affect/alter the market value of the property.
40. In addition, the witness testified that though the property is land locked, the lack of access does not vitiate the carrying out of valuation. At any rate, the witness added that same [witness] indeed proceeded to and concluded the valuation in respect of the suit property.
41. It was the further testimony of the witness that same deployed a comparable approach in arriving at the market value. Nevertheless, the witness averred that same has not included the details of the properties [comparables], which were utilized towards arriving at the market value of the suit property.
42. With the foregoing testimony, the Plaintiff's case was closed.

**b. 1<sup>st</sup> Defendant's Case:**

43. The 1<sup>st</sup> Defendant's case revolves around the evidence of three [3] witnesses, namely Timothy Waiywa Mwangi, Gordon Odeka Ochieng' and Wilfred Muchae Kabue, who testified as DW1, DW2 and DW3, respectively.
44. It was the testimony of DW1 [Timothy Waiywa Mwangi] that same is the Deputy Director of Physical Planning in the Ministry of Public Works & Urban Development. Furthermore, the witness intimated that same has worked with the directorate of physical planning for more than 36 years.
45. It was the further testimony of the witness that by virtue of his portfolio same [witness] is thus conversant with matter pertaining to physical planning. In any event, the witness added that same has recorded a witness statement dated the 30<sup>th</sup> June 2022 and which witness statement the witness has sought to rely on as his evidence in chief. Suffice it to point out that the witness statement was thereafter adopted as evidence in chief of the witness.
46. On the other hand, the witness adverted to a list and bundle of documents dated the 29<sup>th</sup> October 2020 and thereafter sought to tender and produce the said documents as exhibits before the court. There being no objection to the production of the documents at the foot of the list dated 29<sup>th</sup> October 2020, same were marked as exhibits D1 to D3, respectively.
47. Furthermore, the witness also adverted to the list and bundle of documents dated the 30<sup>th</sup> June 2022 containing a total of seven [7] documents, which documents the witness sought to tender and produce before the court. There being no objection to the production of the said documents same [documents] were duly admitted as exhibits D4 to D11, respectively.
48. On cross examination by learned counsel for the 2<sup>nd</sup> Defendant, the witness stated that same has worked with the directorate of physical planning for more than 36 years. Furthermore, the witness averred that by virtue of having worked with the directorate of physical planning same is therefore conversant with the facts of the instant matter.



49. Whilst under further cross examination, the witness averred that the Plaintiff herein was issued with a letter of allotment. Furthermore, the witness also averred that same is also conversant with the fact that the 2<sup>nd</sup> Defendant was also issued with a letter of allotment.
50. It was the testimony of the witness that the letter of allotment issued to the 2<sup>nd</sup> Defendant also had a PDP attached thereto. In this regard, the witness averred that the plan attached to the letter of allotment in favour of the 2<sup>nd</sup> Defendant bore plan number 42/23/95/2A.
51. On the other hand, it was the testimony of the witness that the letter of allotment issued in favour of the Plaintiff does not have a plan number. For good measure, the witness averred that the Plaintiff only had a letter of allotment and had no PDP.
52. Upon being referred to the document at page 31 of the 1<sup>st</sup> Defendant, list and bundle of document, the witness stated that the document herein is a PDP. Furthermore, the witness averred that the PDP corresponds with the 2<sup>nd</sup> Defendant letter of allotment. Besides, the witness added that the PDP has been duly signed by the director of physical planning.
53. It was the further testimony of the witness that once the director of physical planning has signed a PDP, same [PDP] is thereafter forwarded to the commissioner of land for approval and signing. Nevertheless, the witness added that upon execution of the PDP by the commissioner of lands, the commissioner of lands will revert the PDP to the directorate of physical planning for purposes of assignment of a physical planning approval number.
54. Additionally, the witness averred that the directorate of physical planning will also proceed to enter approved physical number in the requisite register. However, the witness averred that the PDP before the court, namely, the one attached to the Letter of allotment in favour of the 2<sup>nd</sup> Defendant, does not have any relevance to the property before court.
55. On further cross examination, the witness averred that the 2<sup>nd</sup> Defendant applied for allotment of land. Besides, the witness also averred that a letter of allotment was issued in favour of the 2<sup>nd</sup> Defendant.
56. Upon being referred to a certificate of title bearing the name of the 2<sup>nd</sup> Defendant, the witness stated that same [witness] cannot confirm whether the certificate of title is genuine or otherwise. At any rate, the witness added that certificate of title is processed and issued by the Chief Land Registrar.
57. On cross examination by learned counsel for the Plaintiff, the witness averred that the letters of allotment were being processed and issued by the office of the commissioner of land. Furthermore, the witness added that the commissioner of land could only issue a letter of allotment after a preparation of a PDP.
58. It was the further testimony of the witness that the PDP would be prepared by the director of physical planning before same [PDP] is forwarded to the office of the commissioner of land. In addition, the witness averred that upon receipt of the PDP, the commissioner of land would approve same and thereafter revert the approved PDP to the directorate of physical planning for purposes of assignment of an approval number.
59. Whilst still under cross examination, the witness averred that the commissioner of lands will revert three [3] sets of the PDP to the directorate of physical planning. It was the further testimony of the witness that in respect of the matter before court, the directorate of physical planning generated a letter which forwarded PDP to the commissioner of land for approval. At any rate, the witness added that the PDP was duly approved.



60. Furthermore, the witness averred that the Plaintiff's letter of allotment was accompanied with an approved PDP No. 42/23/95/3
61. On further cross examination by counsel for the Plaintiff, the witness averred that the PDP which was supporting the allocation of the plot to the Plaintiff was duly forwarded to the commissioner of land. At any rate, the witness added that the PDP was duly approved.
62. It was the further testimony of the witness that the letter of allotment in favour of the Plaintiff was issued on the 5<sup>th</sup> June 1995. Besides, the witness averred that the property which was allocated to the Plaintiff measured 0.56HA. Furthermore, the witness averred that the property which was allocated to the Plaintiff was allocated as an extension to L.R No.8767/2.
63. Whilst under further cross examination, the witness averred that the letter of allotment which was issued in favour of the Plaintiff was time bound. In particular, the witness stated that the payment at the foot of the letter of allotment were to be made within 30 days from the date of issuance. Nevertheless, the witness added that the Plaintiff duly paid the statutory levies within the 30 days from the date of issuance of the letter of allotment.
64. Whilst under further cross examination, the witness averred that the letter of allotment in favour of the 2<sup>nd</sup> Defendant has a different PDP plan. For good measure, the witness stated that the PDP in favour of the 2<sup>nd</sup> Defendant bore plan number 42/23/95/2A.
65. It was the further testimony of the witness that the said PDP relates to proposed extension of L.R No. 209/11602 whereas the land before the court is L.R No. 209/12909.
66. On further cross examination, the witness averred that the PDP No. 42/23/94/15 has never been amended. Furthermore, it was the testimony of the witness that PDP No. 42/23/95/2A has never been approved by the commissioner of lands.
67. On cross examination by learned counsel for the interested party, the witness averred that same has indeed recorded a witness statement. Furthermore, the witness averred that the contents of the witness statement before the court are correct.
68. It was the further testimony of the witness that the directorate of physical planning forwarded to the commissioner of lands PDP for approval. Besides, the witness added that it was the duty of commissioner of lands to deal with approvals. Nevertheless, the witness stated that same has not brought before the court the register of approved PDP.
69. Whilst under further cross examination, the witness averred that the letter of allotment in favour of the Plaintiff does not advert to the PDP No. However, the witness clarified that PDP 42/23/95/3 was never approved.
70. It was the further testimony of the witness that the approval of PDP is a very important process. In any event, the witness added that where the PDP is not approved same cannot be used for purposes of allotment of land.
71. On re-examination by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that where there is an amendment of PDP, same [amendment] would refer to the same property. At any rate, the witness averred that an unapproved PDP cannot be relied upon for allocation of land.
72. On further re-examination, the witness averred that the document at page 4 of the Plaintiff's bundle of document is a copy of letter of allotment which was issued in favour of the Plaintiff. Furthermore, the



- witness has clarified that the letter of allotment relates to an extension to L.R No. 209/8762/2. Besides, the witness added that the planning number relative to the said allotment is number 42/23/95/3.
73. It was the further testimony of the witness that Plan number 42/23/95/2A cannot be deemed to amend PDP No. 42/23/95/3.
  74. The second witness who testified on behalf of the 1<sup>st</sup> Defendant was Gordon Odeka Ochieng. Same testified as DW2.
  75. It was the further testimony of the witness [DW2] that same is currently the Director of Land Administration in the ministry of lands, public works housing and urban development. Besides, the witness averred that same has worked with the ministry since the year 1989. In this regard, the witness averred that same is therefore conversant with the process relating to land administration.
  76. On the other hand, it was the testimony of the witness that in respect of the matter before court same [witness] has recorded a witness statement dated the 22<sup>nd</sup> November 2022 and which witness statement the witness sought to adopt and rely on as his evidence in chief. To this end, the witness statement was duly admitted as evidence in chief.
  77. Furthermore, the Witness also referenced the List and bundle of documents dated the 22<sup>nd</sup> day of November 2022 and thereafter sought to produce same before the Court. There being no objection to the production of the documents at the foot of the list dated 22<sup>nd</sup> November 2022, same were duly admitted as exhibit[s] D12 to D27, respectively on behalf of the 1<sup>st</sup> Defendant.
  78. On cross examination by learned counsel for the 1<sup>st</sup> Defendant, the Witness stated that same [DW2] has worked with the ministry of lands, public works, housing and urban development for more than 29 years. Besides, the witness stated that by virtue of his position, same is privy to and knowledgeable of the process relating to allotment of land.
  79. Besides, the witness averred that same is aware that the commissioner of land proceeded to and issued a letter of allotment in favour of the Plaintiff. Whilst under further cross examination, the witness averred that the commissioner of land also proceeded to and issued another letter of allotment in favour of the 2<sup>nd</sup> Defendant. In this regard, the witness averred that the letter of allotment in favour of the 2<sup>nd</sup> Defendant was illegal.
  80. Whilst under further cross examination, the witness averred that by the time the letter of allotment was being issued in favour of the 2<sup>nd</sup> Defendant, the suit property was already alienated and was therefore private land. In this regard, the witness averred that the letter of allotment in favour of the 2<sup>nd</sup> Defendant was irregular.
  81. It was the further testimony of the witness that though the 2<sup>nd</sup> Defendant had applied to be allocated what now comprise[s] of the suit property as an extension, same [2<sup>nd</sup> Defendant] shortly changed the position vide letter dated the 27<sup>th</sup> October 1995 and sought to be issued with a sperate title.
  82. It was the further testimony of the witness that the Plaintiff herein was issued with a letter of allotment on the 5<sup>th</sup> June 1995. Besides, the witness added that thereafter the Plaintiff proceeded to and made payments pertaining to the statutory levies. In any event, the witness confirmed that the levies were paid within the prescribed timeline.
  83. Other than the foregoing, it was the testimony of the witness that the certificate of title which was issued in favour of the 2<sup>nd</sup> Defendant was found to have been issued by mistake. In this regard, the witness averred that the commissioner of land thereafter wrote a letter to the 2<sup>nd</sup> Defendant seeking for



- surrender the certificate. At any rate, the witness added that the commissioner of land even forwarded a surrender instrument to be executed by the 2<sup>nd</sup> Defendant.
84. Nevertheless, the witness contended that despite the commissioner of lands having forwarded the surrender instrument to the 2<sup>nd</sup> Defendant for execution, the 2<sup>nd</sup> Defendant declined to do so. However, the witness added that by the time the suit property was being allocated to the 2<sup>nd</sup> Defendant, same [suit property] was not available to be allocated to the 2<sup>nd</sup> Defendant.
  85. On cross examination by learned counsel for the Plaintiff, the witness averred that the issuance of the letters of allotment was the responsibility of the commissioner of land. Furthermore, the witness added that the Plaintiff was indeed issued with a letter of allotment. In this regard, the witness added that the letter of allotment in favour of the Plaintiff was issued on the 5<sup>th</sup> June 1995.
  86. Whilst under further cross examination, it was the further testimony of the witness that thereafter the Plaintiff paid the statutory levies within the set timelines. In particular, the witness averred that the Plaintiff paid the statutory levies on the 27<sup>th</sup> June 1995 and same [Plaintiff] was duly issued with a receipt to that effect.
  87. It was the testimony of the witness that upon the payments of the statutory levies by the Plaintiff, the suit property became private land and hence same could not be the subject of subsequent allocation by the commissioner of lands. At any rate, the witness averred that the letter of allotment in favour of the Plaintiff was accompanied with the requisite PDP.
  88. On cross examination by learned counsel for the interested party, the witness averred that the suit property was duly allocated to and in favour of the Plaintiff. Furthermore, the witness averred that the allocation of the suit property in favour of the Plaintiff was underpinned by a duly approved PDP, whose details have been referenced at paragraph 7 of the witness statement.
  89. It was the further testimony of the witness that even though the Plaintiff was issued with a letter of allotment and thereafter same complied with the terms thereof, the Plaintiff was not issued with a certificate of lease.
  90. On the other hand, it was the testimony of the witness that the 2<sup>nd</sup> Defendant was also issued with a letter of allotment. Furthermore, the witness averred that the letter of allotment in favour of the 2<sup>nd</sup> Defendant bears a Part Development Plan [PDP] number.
  91. Whilst under further cross examination, the witness averred that the 2<sup>nd</sup> Defendant was thereafter issued with a certificate of title. However, the witness clarified that the 2<sup>nd</sup> Defendant had initially applied for the suit property as an extension but latter on changed and sought to be issued with a separate and distinct title.
  92. It was the further testimony of the witness that even though the 2<sup>nd</sup> Defendant was issued with a certificate of title, the certificate of title was irregular and illegal.
  93. On re-examination by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that the letter of allotment in favour of the 2<sup>nd</sup> Defendant was unlawful and illegal. At any rate, the witness added that the property which was being allocated to and in favour of the 2<sup>nd</sup> Defendant had already been allocated to and in favour of the Plaintiff and same had been duly paid for.
  94. On further re-examination, the witness averred that the two letters of allotment relates to the suit property. However, the witness added that by the time the letter of allotment in favour of the 2<sup>nd</sup> Defendant was being issued, the land in question was not available for allocation.



95. Furthermore, it was the testimony of the witness that the commissioner of land thereafter generated a surrender instrument which was forwarded to the 2<sup>nd</sup> defendant for execution. At any rate, it was the testimony of the witness that the commissioner of lands drew the attention of the 2<sup>nd</sup> Defendant to the error attendant to the allotment of the suit property.
96. On further re-examination, it was the evidence of the witness that the letter of allotment in favour of the 2<sup>nd</sup> Defendant was illegal. For good measure, the witness clarified that the suit property had long been allocated to the Plaintiff and thus same was private property.
97. The third witness who testified on behalf of the 1<sup>st</sup> Defendant was Wilfred Muchai Kabue. Same testified as DW3.
98. It was the testimony of the witness that same is currently the assistant director of survey working with the ministry of lands, public works, housing and urban developments. Furthermore, the witness averred that same has worked with the directorate of survey for more than 29 years.
99. It was the further testimony of the witness that by virtue of his portfolio, same [witness] is conversant with matter pertaining to survey. Furthermore, the witness averred that same has since recorded a witness statement dated the 22<sup>nd</sup> November 2022 and which witness statement the witness sought to adopt and rely on as his evidence in chief.
100. Suffice it to point out that the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.
101. Other than the foregoing, the witness adverted to the list and bundle of document dated the 22<sup>nd</sup> November 2022 and which documents the witness sought to tender and produce before the court. There being no objection to the production of the documents, same were produced and admitted in evidence as exhibits D28 to D50, respectively on behalf of the 1<sup>st</sup> Defendant.
102. On cross examination, the witness averred that same has recorded and filed an elaborate witness statement, which has explained the process pertaining to survey, preparation of deed plan as well as cadastral plans, respectively.
103. It was the further testimony of the witness that before a letter of allotment can be issued, the directorate of physical planning must prepare the requisite PDP. Besides, the witness clarified that the purpose of a Part Development Plan [PDP] is to confirm whether the land is available for allocation.
104. On further cross examination, the witness averred that a letter of allotment was indeed issued in favour of the 2<sup>nd</sup> Defendant. At any rate, the witness added that the letter of allotment in favour of the 2<sup>nd</sup> Defendant contained the details of the land which was being allocated.
105. On further cross examination, the witness averred that the letter of allotment in favour of the 2<sup>nd</sup> Defendant was in respect of an extension. However, it was the further testimony of the witness that the subsequent activities including the issuance of a separate title were irregular and unlawful. Furthermore, the witness averred that the certificate of title of the suit property which was issued in favour of the 2<sup>nd</sup> Defendant was unlawful.
106. Whilst under further cross examination, it was the testimony of the witness that the dispute before the court touches on and concerns ownership of the suit property.
107. On cross examination by learned counsel for the interested party, the witness averred that the directorate of survey does not deal with allocation of land. In particular, the witness stated that the directorate of survey will only deal with preparation of the deed plan. Nevertheless, it was the testimony



- of the witness that the mandate of allocation of land fell within the jurisdiction of the commissioner of land.
108. On further cross examination, it was the testimony of the witness that the suit property is known as L.R No. 209/12909. At any rate, the witness clarified that the 2<sup>nd</sup> Defendant holds a certificate of title in respect of the suit property.
  109. On the other hand, the witness averred that the land in question had also been allocated in favour of the Plaintiff. Besides, it was the testimony of the witness that a request was made to the directorate of survey for purposes of preparation of a deed plan. Furthermore, the witness added that the request for the deed plan was made by the Plaintiff. However, the witness added that the request was neither finalized nor concluded.
  110. On cross examination by learned counsel for the Plaintiff, the witness averred that same has recorded an elaborate and comprehensive witness statement relative to the instant matter. Furthermore, the witness stated that the directorate of survey is the one responsible for the preparation of a deed plan.
  111. Upon being referred to the letter at page 17 of the Plaintiff's bundle of documents, the witness stated that the documents under reference is a letter from the commissioner of lands. Besides, it was the testimony of the witness that the letter in question was addressed to the 2<sup>nd</sup> Defendant by the commissioner of lands and same sought to have the certificate of title in favour of the 2<sup>nd</sup> Defendant surrendered.
  112. On further cross examination, the witness averred that the surrender was sought for on the basis that the allotment in favour of the 2<sup>nd</sup> Defendant was premised on misrepresentation of facts to the commissioner of lands.
  113. On the other hand, it was the testimony of the witness that the allotment of the disputed property in favour of the Plaintiff was predicated on the basis of a duly approved PDP. In this regard, the witness adverted to the PDP dated/prepared on the 9<sup>th</sup> May 1995.
  114. On re-examination by learned counsel for the 1<sup>st</sup> Defendant, the witness stated that the suit property was lawfully allocated to the Plaintiff. Furthermore, it was the testimony of the witness that the letter of allotment in favour of the Plaintiff and the one in favour of the 2<sup>nd</sup> Defendant relate to the same geo-space. At any rate, the witness averred that the two letters of allotment relate to the suit property.
  115. Upon being referred to the document at page 15 of the 1<sup>st</sup> Defendant's list and bundle of documents, the witness stated that the document is from the commissioner of land and addressed to the 2<sup>nd</sup> Defendant. For good measure, the witness contended that the letter under reference sought to have the certificate of title in favour of the 2<sup>nd</sup> Defendant to be surrendered.
  116. Additionally, the witness averred that the surrender of the certificate of title was sought on the basis that same had been procured by misrepresentation and mistake.
  117. With the foregoing testimony, the 1<sup>st</sup> Defendant's case was duly closed.

**c. 2<sup>nd</sup> Defendant's Case:**

118. The 2<sup>nd</sup> Defendant's case is premised on the evidence of one witness, namely, Ketul Tanna. Same testified as DW4.
119. It was the testimony of the witness that same is a director of the 2<sup>nd</sup> Defendant. In this regard, the witness averred that by virtue of his portfolio, same [witness] is therefore conversant with the facts of the suit.



120. On the other hand, the witness averred that same has since recorded a witness statement in respect of the matter and which witness statement is dated the 22<sup>nd</sup> October 2015. Furthermore, the witness thereafter sought to adopt and rely on the witness statement as his evidence in chief.
121. Suffice it to point out that the witness statement dated the 22<sup>nd</sup> October 2015 was thereafter adopted and constituted as the evidence in chief of the witness.
122. Other than the foregoing, the witness adverted to the list and bundle of documents dated the 22<sup>nd</sup> October 2015, containing two [2] documents and which the witness sought to tender and produce before the court. There being no objection to the production of the documents, same [documents] were thereafter tendered and produced as exhibits D1 and D2 on behalf of the 2<sup>nd</sup> Defendant.
123. Additionally, the witness intimated to the court that the 2<sup>nd</sup> Defendant had also filed an amended statement of defence in respect of this matter. To this end, the witness adverted to the amended statement of defence dated the 22<sup>th</sup> March 2022 and which amended statement of defence the witness sought to adopt and to rely on.
124. On cross examination, by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that same became a director of the 2<sup>nd</sup> Defendant around the year 2010. Furthermore, the witness added that same [witness] became a director after his [witness] father passed on.
125. Whilst under further cross examination, it was the testimony of the witness that the 2<sup>nd</sup> Defendant has a total of 5 directors. In this regard, the witness clarified that he [witness] is only one of the directors.
126. As to whether same [witness] has been mandated and authorized by the rest of the directors, same confirmed that he had been authorized. Nevertheless, the witness admitted that the authority has neither been tendered nor produced before the court.
127. On further cross examination, the witness averred that same [witness] was not privy to the process leading to the allotment of the land in favour of the 2<sup>nd</sup> Defendant.
128. It was the further testimony of the witness that the application for allotment of the suit property to the 2<sup>nd</sup> Defendant was made on behalf of the 2<sup>nd</sup> Defendant by one Enock Tuitoek. Besides, the witness added that one Enock Tuitoek is one of the directors of the 2<sup>nd</sup> Defendant.
129. In addition, it was the testimony of the witness that the letter of allotment in favour of the 2<sup>nd</sup> Defendant was issued on the 26<sup>th</sup> October 1995. Furthermore, the witness added that the letter of allotment related to an extension to L.R No 209/12374, which is a property than belongs to the 2<sup>nd</sup> Defendant.
130. On further cross examination and upon being referred to the document at page 16 of the Plaintiff bundle of document, the witness stated that the documents under reference is dated the 1<sup>st</sup> April 1998. Furthermore, the witness averred that the document under reference is a document by the commissioner of land and same is addressed to the 2<sup>nd</sup> Defendant. Furthermore, the witness averred that the letter under reference sought to have the certificate of title in favour of the 2<sup>nd</sup> Defendant to be surrendered.
131. It was the further testimony of the witness that the letter dated the 1<sup>st</sup> April 1998 also attached a surrender instrument which was to be executed by the 2<sup>nd</sup> Defendant. However, the witness added that the 2<sup>nd</sup> Defendant did not execute the surrender instrument.



132. Whilst still under cross examination, the witness averred that the suit property is landlocked. Nevertheless, the witness clarified that the suit property is accessible through the Plaintiff's parcel of land.
133. On the other hand, it was the testimony of the witness that the suit property was allocated as an extension. At any rate, the witness added that the property was not allocated as an individual or standalone plot.
134. It was the further evidence of the witness that the commissioner of lands recalled the certificate of title in favour of the 2<sup>nd</sup> Defendant. In this respect, the witness averred that same [witness] got to know of the facts of the plot after the death of his father.
135. On further cross examination, it was the testimony of the witness that same proceeded to and charged the suit property to the interested party in the year 2019. In particular, the witness added that the charge in favour of the interested party is dated the 21<sup>st</sup> August 2019.
136. Other than the foregoing, the witness averred that the charge in favour of interested party was perfected and registered during the pendency of the instant suit. At any rate, the witness added that same was aware of the existence of the suit by the time same [witness] offered the suit property for charge.
137. On further cross examination, the witness averred that the suit property was allocated for purposes of residential. Besides, the witness added that the grant relating to the suit property contained special conditions including submissions of plans to the commissioner of lands. However, the witness added that no plans were ever submitted to the commissioner of lands.
138. On the other hand, it was the testimony of the witness that the suit property was allocated as an extension. Besides, the witness confirmed that the area of the suit property was 0.56HA.
139. On further cross examination, the witness stated that same has since come across the letter of allotment in favour of the Plaintiff. For good measure, the witness added that the letter of allotment in favour of the Plaintiff is dated the 5<sup>th</sup> June 1995. Furthermore, it was the testimony of the witness that the Letter of allotment herein relates to the same property.
140. It was the further testimony of the witness that the application letter for allotment of the suit was authored by one Enock Tuitoek. Furthermore, the witness added that Enock Tuitoek was never a director of the 2<sup>nd</sup> Defendant.
141. Nevertheless, whilst under further cross examination, the witness averred that same is aware that the deed plan in respect of the suit property was collected by Enock Tuitoek. Furthermore, the witness added that the said Enock Tuitoek collected the deed plan of the suit property on behalf of the 2<sup>nd</sup> Defendant.
142. On cross examination by learned counsel for the interested party, the witness stated that the suit property is currently charged to and in favour to the interested party. Furthermore, the witness confirmed that the charge in favour of the interested party is duly registered at the lands office.
143. On further cross examination, the witness averred that before the property was charged in favour of the interested party, the interested party sought for and obtained a consent to charge. In addition, the witness averred that the consent to charge was issued by the commissioner of lands.
144. Whilst under further cross examination, the witness averred that the 2<sup>nd</sup> Defendant was issued with a certificate of title/grant on the 21<sup>st</sup> December 1995. Furthermore, it was averred that by the time the



- commissioner wrote a letter dated the 1<sup>st</sup> April 1998, the 2<sup>nd</sup> Defendant had long been issued with the certificate of title.
145. On further cross examination, the witness averred that the 2<sup>nd</sup> Defendant was issued with a letter of allotment in respect of the suit property. In this regard, the witness added that the suit property was duly allocated to the 2<sup>nd</sup> Defendant.
146. Other than the foregoing, it was the testimony of the witness that the letter dated the 1<sup>st</sup> April 1998 by the commissioner of lands was never received by the 2<sup>nd</sup> Defendant. Furthermore, the witness averred that the surrender instrument alluded to at the foot of the said letter was similarly not forwarded. Furthermore, the witness testified that the 2<sup>nd</sup> Defendant was not obligated to surrender the certificate of title.
147. On re-examination by learned counsel for the 2<sup>nd</sup> Defendant, the witness averred that the Plaintiff's letter of allotment was first in time. Nevertheless, the witness averred that despite being the first in time, the Plaintiff herein was never issued with a certificate of title.
148. On further re-examination, the witness averred that it is only the 2<sup>nd</sup> Defendant who has a certificate of title in respect of the suit property. In this regard, the witness averred that the suit property belongs to the 2<sup>nd</sup> Defendant.
149. With the foregoing testimony, the 2<sup>nd</sup> Defendant's case was duly closed.
- d. Interested Party's Case:
150. The interested party's case is premised on the evidence of one witness, namely, George Wachira Muthoni. Same testified as IW 1.
151. It was the testimony of the witness that same is currently working for the interested party. In particular, the witness averred that same is a senior manager, legal and recoveries. Furthermore, the witness averred that by virtue of his portfolio same [witness] is conversant to the facts of the instant matter.
152. Additionally, the witness stated that same has since recorded a witness statement dated the 16<sup>th</sup> February 2023. In this regard, the witness sought to adopt and rely on the witness statement as his [witness] evidence in chief.
153. Suffice it to point out that the witness statement dated the 16<sup>th</sup> February 2023 was thereafter adopted and constituted as the evidence in chief of the witness. On the other hand, the witness adverted to the list and bundle of documents dated the 5<sup>th</sup> December 2022 and thereafter sought to tender and produce the documents before the court. There being no objection to the production of the documents, same were produced as exhibits IP 1 to 3 on behalf of the interested party.
154. On cross examination by learned counsel for the 2<sup>nd</sup> Defendant, the witness averred that the suit property was charged to the interested party. Furthermore, the witness averred that prior to the charge, the interested party undertook due diligence. It was the further evidence of the witness that the due diligence which was conducted and/ or carried out included undertaking an official search over and in respect of the suit property. In this regard, the witness added that the official search revealed that the suit property was in the name of the 2<sup>nd</sup> Defendant.
155. On the other hand, it was the testimony of the Witness for the interested party that same also sought for and obtained a consent to charge the suit property. For good measure, the witness averred that the consent to charge the property was signed by and on behalf of the commissioner of land.



156. Whilst still under cross examination, the witness averred that the property is validly charged to and in favour of the bank.
157. On cross examination by learned counsel for the Plaintiff, the witness averred that prior to granting a loan facility, the interested party would ordinarily undertake due diligence over the security to be charged. In any event, the witness added that the due diligence to be undertaken includes carrying out an official search over the intended property.
158. Whilst under further cross examination by learned counsel for the Plaintiff, the witness stated that the interested party indeed undertook due diligence and established that there was no encumbrance thereto.
159. On the other hand, it was the testimony of the witness that the interested party was not aware of the existence of the suit [case herein] at the onset. At any rate, the witness added that the interested party got to know of the existence of the suit/ case herein much latter.
160. It was the further the testimony of the witness that the interested party commissioned valuation of the suit property. However, the witness admitted that the valuation exercise was not concluded.
161. It was the testimony of the witness that despite the fact that the valuation exercise was not concluded, the bank nevertheless proceeded to and granted the banking facility in favour of the 2<sup>nd</sup> Defendant.
162. On cross examination by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that the bank proceeded to grant the facility in favour of the 2<sup>nd</sup> Defendant because same [2<sup>nd</sup> Defendant] had demonstrated the ability to repay the facility. Furthermore, the witness averred that the borrower at the foot of the charge was Ketul Tanna whilst the 2<sup>nd</sup> Defendant was the charger.
163. It was the further testimony of the witness that the charge in respect of the suit property was registered on the 4<sup>th</sup> September 2019. At any rate, the witness added that by the time the charge was being registered, the suit herein was already in existence. For good measure, the witness averred that the interested party discovered the existence of the suit in the year 2022.
164. Whilst under further cross examination, the witness averred that though the interested party commissioned valuation in respect of the suit property, the valuation exercise was not concluded.
165. On re-examination by learned counsel for the interested party, the witness stated that same has not come across the letter at page 15 of the 1<sup>st</sup> Defendant list and bundle of document. For good measure, the witness added that same [witness] only came across the letter when he was testifying before the court.
166. On further re-examination, the witness stated that the letter in question was issued by the commissioner of lands and same was addressed to the 2<sup>nd</sup> Defendant. Furthermore, the witness added that the letter under reference sought to have the certificate of title by the 2<sup>nd</sup> Defendant to be surrendered.
167. It was the further testimony of the witness that prior to the issuance of the banking facility, the interested party undertook due diligence over the suit property.
168. On further re-examination, the witness averred that the Interested party was not aware of the existence of the suit at the time when same [interested party] disbursed the banking facility. Nevertheless, the Witness added that if the interested party was aware of the suit herein, same [interested party] would not have granted the facility.



169. With the foregoing testimony, the Interested party's case was duly closed.

**Parties' Submissions:**

170. Upon the close of the hearing, the advocates for the respective parties covenanted to file and exchange written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
171. Pursuant to and in line with the directions, the Plaintiff proceeded to and filed two [2] sets of written submissions dated the 31<sup>st</sup> May 2024 and the 15<sup>th</sup> July 2024. For good measure, the Plaintiff raised and canvassed four [4] salient issues at the foot of the maiden submissions.
172. On the other hand, the 1<sup>st</sup> Defendant filed elaborate written submissions dated the 12<sup>th</sup> July 2024 and in respect of which same [1<sup>st</sup> Defendant] similarly highlighted and canvassed four salient issues. Suffice it to point out that the written submissions by the 1<sup>st</sup> Defendant were accompanied with a plethora of decisions/case law running into 333 pages.

PARA 173.

The 2<sup>nd</sup> Defendant filed written submissions dated the 11<sup>th</sup> June 2024 and wherein same also highlighted four issues. Pertinently, the 2<sup>nd</sup> Defendant took the position that the suit property was lawfully allocated to and thereafter registered in the name of the 2<sup>nd</sup> Defendant. In any event, the 2<sup>nd</sup> Defendant contended that same was issued with a certificate of title as opposed to the Plaintiff, who has no certificate of title to and in respect of the suit property.

174. The Interested Party also filed written submission. For coherence, the written submissions by the Interested Party are dated the 2<sup>nd</sup> July 2024, and wherein the interested party has highlighted three salient issues for consideration. In particular, the interested party has contended that the suit property was lawfully registered in favour of the 2<sup>nd</sup> Defendant and furthermore that the charge in respect thereof was registered with the consent of the government.
175. Suffice it to underscore that the various submissions [details in terms of the preceding paragraphs] form part of the record of the court. Furthermore, the court has reviewed the contents of the written submissions and taken same into consideration whilst discerning the issues for determination and thereafter engaging with the pertinent issues flowing from both the pleadings, the evidence and the said written submissions.
176. Even though the court has neither rehashed nor reproduced the contents of the written submissions filed by and on behalf of the respective parties, it is imperative to underscore that the non-reproduction of the written submissions is not informed by any contempt. At any rate, the court wishes to acknowledge and appreciate the comprehensive submissions and the issues highlighted thereunder by the respective parties.

**Issues For Determination:**

177. Having reviewed the pleadings filed by the respective parties as well as the evidence tendered and upon consideration of the written submissions filed on behalf of the parties, the following issues crystallize and are thus worthy of determination;
- i. Whether the property which was allocated to the Plaintiff at the foot of the letter of allotment dated the 5<sup>th</sup> June 1995 is the same with the one subsequently allocated to the 2<sup>nd</sup> Defendant or otherwise.



- ii. Whether the suit property was duly allocated to the Plaintiff and if so, whether same was available for allocation to the 2<sup>nd</sup> Defendant or otherwise.
- iii. Whether the certificate of title in favour of the 2<sup>nd</sup> Defendant is lawful or otherwise.
- iv. Whether the charge in favour of the interested party was contrary to the doctrine of Lis pendens and if so, whether same is lawful or otherwise.

## **Analysis And Determination**

### **Issue Number 1. Whether the property which was allocated to the Plaintiff at the foot of the letter of allotment dated the 5<sup>th</sup> June 1995 is the same with the one subsequently allocated to the 2<sup>nd</sup> Defendant or otherwise.**

178. The Plaintiff herein, who testified as PW1, tendered evidence to the effect that one Kantibhai Maganbhai Patel, [now deceased] applied for and was allocated a piece of land which was lying adjacent to L.R No. 8762/2 Nairobi. Furthermore, the witness averred that the allotment at the foot of the letter of allotment was granted as an extension to L.R No. 8762/2.
179. It was the further testimony of the witness that upon being issued with the letter of allotment dated the 5<sup>th</sup> June 1995, Kantibhai Maganbhai Patel [now deceased] proceeded to and complied with the terms espoused at the foot of the letter of allotment. In this regard, evidence was tendered that the deceased indeed made the requisite payments, which were duly received and accepted by the commissioner of lands in terms of the receipt issued on the 27<sup>th</sup> June 1995.
180. Notwithstanding the foregoing, PW1 contended that the same piece/parcel of land which had hitherto been allocated to Kantibhai Maganbhai Patel [now deceased], at the foot of the letter of allotment dated the 5<sup>th</sup> June 1995 was subsequently allocated to and in favour of the 2<sup>nd</sup> Defendant vide letter of allotment dated the 26<sup>th</sup> October 1995.
181. According to PW1, what was allocated to and in favour of the 2<sup>nd</sup> Defendant and which was thereafter registered as L.R No. 209/12909 [suit property], is the same piece of land which had been allocated to Kantibhai Maganbhai Patel [now deceased].
182. Additionally, PW1 contended that the allocation of what now constitutes the suit property to and in favour of the 2<sup>nd</sup> Defendant was irregular, illegal and unlawful. In particular, the witness averred that the same piece of land could not have been allocated to and in favour of the 2<sup>nd</sup> Defendant, long after same [parcel of land] had been allocated to Kantibhai Maganbhai Patel [now deceased].
183. On the other hand, the 2<sup>nd</sup> Defendant filed a statement of defence dated the 6<sup>th</sup> November 2001 and which was subsequently amended and wherein the 2<sup>nd</sup> Defendant contended that the parcel of land which now comprises the suit property is not the same as the one which the Plaintiff claims or alleges to have been allocated.
184. In this respect, it imperative to reproduce the contents of paragraph 5 of the statement of defence.
185. Same is reproduced as hereunder;  
  
“ This Defendant does not admit that L.R No. 209/12909 is the very same plot as the plot alleged by the Plaintiff to have been allocated to him. L.R No. 209/12909 is 0.6161HA. the plot alleged to have been granted to the Plaintiff is on his own showing 0.56HA.



186. From the contents of paragraph 5 of the statement of defence [which have been reproduced in the preceding paragraph], it is evident that the 2<sup>nd</sup> Defendant is contending that what comprises of the suit property sits on a separate and distinct geo-space [ground location] from the plot that is being claimed by the Plaintiff.
187. Furthermore, DW4 who was the sole witness who testified on behalf of the 2<sup>nd</sup> Defendant adopted his witness statement dated the 22<sup>nd</sup> October 2015 and in respect of which same DW4 reiterated that the suit property is separate and distinct from the plot which is claimed by the Plaintiff.
188. The contents of paragraph 5 of the witness statement of Ketul Tanner [DW4] states as hereunder;
- “This Defendant does not admit that L.R No. 209/12909 is the very same plot as the plot alleged by the Plaintiff to have been allocated to him. L.R No. 209/12909 is 0.6161HA. the plot alleged to have been granted to the Plaintiff is on his own showing 0.56HA.”
189. From the foregoing averments, it becomes necessary and apposite for this court to determine whether or not the plot which was allocated to the Plaintiff at the foot of the letter of allotment dated the 5<sup>th</sup> June 1995, and the plot which was allocated to the 2<sup>nd</sup> Defendant, sit on the same geo-space.
190. To start with, it is the evidence of PW1 that the plot which was allocated to Kantibhai Maganbhai Patel [now deceased] and whose estate is represented by PW1, is the same plot that was subsequently allocated to and in favour of the 2<sup>nd</sup> Defendant. Indeed, it is the said allocation which is contended to be irregular, illegal and unlawful.
191. On the other hand, DW3 namely Wilfred Kabue Muchai testified and adopted his witness statement dated the 28<sup>th</sup> November 2022. In particular, DW3 stated as hereunder;
- “Paragraph 35.
- It is not worthy that the geo-space occupied by the parcel of land No. L.R No. 209/12909, was initially allocated in part as unsurveyed plot number A in favour of K.M Patel, P.O Box 49754, Nairobi, the proprietor of parcel of land number L.R No. 209/8762/2, which was thereafter surveyed as represented in cadastral plan number F/R No. 226/22- survey COMPS No 27463 as new Grant parcel of land number L.R No. 209/11613 measuring approximately 0.3532HA and a further allocation of unsurveyed plot number B in favour of K.M Patel of P.O Box 49754, Nairobi, and of which was latter surveyed as represented in cadastral plan number F/R No. 232/45-survey COMPS No. 28373 as new Grant parcel of land No. L.R No 209/11825 measuring approximately 0.2823HA
- Paragraph 36
- The dispute at hand between the proprietor of parcel of land number L.R No 209/8762/2 and the proprietor of parcel of land number L.R No. 209/12909 over the geo-space occupied by L.R No. 209/12909 may be resolved with the guidance of the court by the examination of the process leading to the allocation of the subject property and accrual of rights thereto in respect of the subject property
192. From the witness statement of Wilfred Muchai Kabue [DW3] and which was adopted as the evidence in chief of the said witness, it is evident that the suit property, namely L.R No. 209/12909, sits on the same geo-space as the plot which was previously allocated to and in favour of the Plaintiff.



193. First forward, DW4 [Ketul Tanner] who testified on behalf of the 2<sup>nd</sup> Defendant admitted and acknowledged that what constitutes the suit property is indeed the same as the property that is being claimed by the Plaintiff.
194. Whilst under cross examination by learned counsel for the 1<sup>st</sup> Defendant DW4 stated as hereunder;
- I have a copy of the letter of allotment. It is dated the 26<sup>th</sup> October 1995. The letter of allotment is in respect of an extension. The area is 0.56HA. the acreage of the extension that was being allocated to the 2<sup>nd</sup> Defendant is 0.56HA. referred to the document filed by the attorney general and in particular, the copy of the letter of allotment in favour of the Plaintiff, the witness avers that the letter of allotment is also in respect of a proposed extension.
195. Whilst under further cross examination, DW4 stated thus;
- The letter of allotment herein is dated the 5<sup>th</sup> June 1995. The letter of allotment herein is in relation to the same property. The acreage of the property is also shown to be 0.56HA. the acreage corresponds with my letter of allotment.
196. Suffice it to point out that even though the 2<sup>nd</sup> Defendant had previously contended that the suit property is separate and distinct from the plot being claimed by and on behalf of the Plaintiff, the 2<sup>nd</sup> Defendant beat an about turn and acknowledged that the suit property is indeed the same as the plot that was previously allocated to the Plaintiff.
197. At any rate, there is no gainsaying that the two letters of allotment, namely the letter of allotment dated the 5<sup>th</sup> June 1995 and the one dated the 26<sup>th</sup> October 1995, both indicate the acreage of the plot that was being allocated as 0.56HA. For good measure, the acreage is the same.
198. Flowing from the foregoing analysis, what is apparent is that the suit property sits and occupies the same geo-space that had previously been allocated to and in favour of the Plaintiff. In this respect, the contention that was espoused by the 2<sup>nd</sup> Defendant and which purported that the suit property was separate and distinct from the plot claimed by the Plaintiff is misleading and erroneous.
199. In the premises and arising from the foregoing, my answer to issue number one is to the effect that the plot claimed by the Plaintiff [on the basis of the letter of allotment dated the 5<sup>th</sup> June 1995] is the same plot which was subsequently registered and assigned as L.R No. 209/12909 [the suit property].

**Issue Number 2. Whether the suit property was duly allocated to the Plaintiff and if so, whether same was available for allocation to the 2<sup>nd</sup> Defendant or otherwise.**

200. Having disposed of issue number one [1] pertaining to and concerning whether the plot claimed by the Plaintiff is separate and distinct from the suit property or otherwise, it is now apposite to venture forward and ascertain whether the plot claimed by the Plaintiff was lawfully allocated to and in favour of the Plaintiff.
201. To start with, it was the testimony of PW1 that Kantibhai Maganbhai Patel [now deceased], applied to be allocated a plot which was adjacent to his [deceased] plot situated at Kileleshwa. To this end, the Plaintiff tendered and produced before the court a copy of the letter dated the 13<sup>th</sup> October 1994.
202. Subsequently, the commissioner of lands requested the directorate of physical planning to generate/prepare the requisite PDP relating to the proposed extension to L.R No 209/8762/2. In this respect, the directorate of physical planning thereafter proceeded to and generated the requisite PDP No.



42/23/95/3 which PDP was thereafter forwarded to the commissioner of land vide letter dated the 9<sup>th</sup> May 1995.

203. Suffice it to point out that upon receipt of the PDP No. 42/23/95/3, the commissioner of land proceeded to and issued a letter of allotment to and in favour of Khantibhai Maganbhai Patel [now deceased]. The letter of allotment is dated the 5<sup>th</sup> June 1995 and same is attached to a PDP duly signed and approved by the Commissioner of lands on the 12<sup>th</sup> May 1995. [See exhibits P4 and 5], respectively.
204. Subsequently, the Plaintiff herein proceeded to and accepted the terms of the letter of allotment. Furthermore, the Plaintiff also proceeded to and paid the statutory levies, which were highlighted in the body of the letter of allotment. For coherence, the payments of the statutory levies, including the standard premiums were duly receipted in terms of the receipt dated the 27<sup>th</sup> June 1995. [See exhibit P7].
205. It is worthy to state and reiterate that the payments which were made by the Plaintiff and which were duly received and acknowledged by the commissioner of lands in terms of the receipt dated the 27<sup>th</sup> June 1995, were made within the prescribed timelines. Simply put, the payments were made within the stipulated 30 days period.
206. To the extent that the Plaintiff herein had duly accepted the terms of the letter of allotment and thereafter ventured forward to make the requisite payments, it suffices to underscore that the Plaintiff had fulfilled all the terms adverted to and espoused at the foot of the letter of allotment. In this regard, there arose a binding contract between the commissioner of lands [now defunct] and the Plaintiff as pertains to the plot which was the subject of allotment.
207. Furthermore, it is common ground that upon the issuance of the letter of allotment and the payment of the requisite statutory levies, the plot at the foot of the letter of allotment became duly allocated and thus ceased to be an unalienated government land in terms of the provisions of Section of 2 of the GLA, now repealed.
208. Suffice it to point out that what constituted an unalienated government land was defined as hereunder;
- “unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.
209. From the definition of what constitutes an unalienated government land, it is evident that same [unalienated government land] does not include land in respect of which the commissioner of lands has issued a letter of allotment. In this regard, the issuance of the letter of allotment to and in favour of the Plaintiff, took the designated plots outside the scope and purview of unalienated government land.
210. In the case of Kenya Anti-Corruption Commission v Online Omega Enterprises Ltd [2019]eKLR, the court whilst discussing the import of what constitutes unalienated government land state and held thus;

Under the Government *Land Act* [Chapter 2 Laws of Kenya] the commissioner of lands can only make grants or disposition of any estate, interest or rights in or over unalienated government land [Section 3]. In the instant case, the two parcel of land amongst others have been alienated and designated for particular purposes. It was not open for the commissioner of lands to re-alienate the same. So the alienation was void ab initio.



211. In my humble view, the moment the commissioner of lands issued the letter of allotment dated the 5<sup>th</sup> June 1995, the designated plot, which was allocated as extension to L.R No. 209/8762/2, ceased to be unalienated government land.

212. Other than the foregoing, it is also worthy to underscore that upon the payment of the statutory levies, which was duly receipted, the Plaintiff herein acquired lawful interests to and in respect of the designated plot and which interest could not be defeated by the commissioner of land, without due process being complied with.

213. To this end, it suffices to take cognizance of the holding of the Court of Appeal in the case of Swaleh Mohamed Waziri & 3 others v Houd Mohmoud Athman & another [2020] eKLR held that:-

“...an allottee having been allotted land by the Commissioner of Lands and duly paid all the stand premiums and other related charges, is considered to have acquired rights over such land, which thereafter rendered it unavailable for allocation to other persons or entities.”

214. In addition, it is also worthy to cite and reference the decision in the case of *Waterfront Holdings Limited v Kandie & 2 others (Civil Appeal 88 of 2019)* [2023] KECA 1223 (KLR) (6 October 2023) (Judgment), where the court stated and held thus;

54. From the foregoing, the legal position is not that once issued, the letter of allotment lasts indefinitely. There must be an acceptance of the offer to allot the land by the allottee fulfilling the conditions specified for the said allotment. To that extent, we associate ourselves with this Court’s decision in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR which express the general law in contractual matters. “It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration.”

215. Furthermore, the propriety of the letter of allotment that was issued to and in favour of the Plaintiff was also spoken to and authenticated by one Gordon Odeka Ochieng, namely, the Director of Land Administration. Same testified as DW2.

216. Whilst under cross examination by learned counsel for the 2<sup>nd</sup> Defendant, the witness stated as hereunder;

I do confirm that the Plaintiff was issued with a letter of allotment. The letter of allotment in favour of the Plaintiff is dated the 5<sup>th</sup> June 1995. I do confirm that the letter of allotment was signed by the commissioner. I do confirm that the Plaintiff was not issued with a certificate of title.

217. Whilst under cross examination by learned counsel for the Plaintiff, DW2 stated thus;

I do confirm that the Plaintiff did make an application for allotment of land. I also do confirm that the commissioner of land indeed made allotment in favour of the Plaintiff. the letter of allotment is dated the 5<sup>th</sup> June 1995. The allottee was the Plaintiff. the letter of allotment shows the amount of money that was to be paid by the allottee. The duration within which the payment was to be made was 30 days. I do confirm that the payments were made on the 27<sup>th</sup> June 1995. The land in question became private land. The land vested in



the Plaintiff. the commissioner of land could not purport to re-allocate the land in favour of the 2<sup>nd</sup> Defendant.

218. From the testimony of DW2 [director of land administration], it is apparent that the plot in question stood alienated to and in favour of the Plaintiff. In fact, DW2 reiterates that the designated plots which formed the basis of the letter of allotment dated the 5<sup>th</sup> June 1995, became private land once the Plaintiff paid the requisite statutory levies.
219. Suffice it to underscore that DW2, re-affirms the legality of the letter of allotment that was issued to and in favour of the Plaintiff. In this regard, there is no gainsaying that the plot in question, was duly and lawfully allocated to the Plaintiff.
220. Furthermore, it is worthy to recall that prior to the issuance of the letter of allotment, the commissioner of land called upon the directorate of physical planning to prepare the requisite PDP to facilitate the allotment of the plot in question.
221. In addition, evidence abound that the directorate of physical planning indeed proceeded to and generated the requisite PDP which were thereafter forwarded to the commissioner of land for approval and subsequent action. For good measure, the PDP which was forwarded vide the letter dated 9<sup>th</sup> May 1995 was duly approved by the commissioner of land on the 12<sup>th</sup> May 1995 culminating into the letter of allotment.
222. To my mind, the process that was followed by the commissioner of lands prior to and before the issuance of the letter of allotment in favour of the Plaintiff complied with the provisions of the Physical Planning Act [now repealed] and thus the allotment of the plot in favour of the Plaintiff was lawful.
223. Before departing from the issue herein, it suffices to take cognizance of the holding of the Supreme Court of Kenya [ the Apex Court] in the case of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), where the court elaborated the process attendant to the allocation of unalienated government land under the Government Land Act [now repealed].
224. For coherence, the court stated as hereunder;

104. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in Nelson Kazungu Chai & 9 others v Pwani University [2014] eKLR as follows: "...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees."

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013 where Njagi J held as follows:

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



to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

105. This process is restated in *African Line Transport Co Ltd v Attorney General, Mombasa*, HCCC No 276 of 2003 [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.
225. Arising from the foregoing, my answer to issue number two is threefold. Firstly, the Plaintiff herein duly applied to be allocated the designated plot, which now comprises of the suit property and the application for allotment was duly received and acted upon by the commissioner of lands.
226. Secondly, upon receipt of the application for allotment of the designated plot, the commissioner of land called for the PDP from the directorate of physical planning, leading to the preparation of the PDP No. 42/23/95/3 which was thereafter duly approved by the commissioner on the 12<sup>th</sup> May 1995. In this regard, the allotment of the plot was premised/anchored on an approved PDP.
227. Thirdly, the Plaintiff proceeded to and made the requisite payments at the foot of the letter of allotment. At any rate, the payments were made within the stipulated/prescribed timeline. In this regard, upon receipt of the payments at the foot of the letter of allotment, a binding contract arose and/or ensued.
228. To surmise, the designated plot which now comprises of the suit property was lawfully and legally allocated to the Plaintiff in terms of the letter of allotment dated the 5<sup>th</sup> June 1995. Subsequently, the designated plot ceased to an unalienated government land.

**Issue Number 3. Whether the certificate of title in favour of the 2<sup>nd</sup> Defendant is lawful or otherwise.**

229. Having found and held that the plot which was allocated to and in favour of the Plaintiff in terms of the letter of allotment dated the 5<sup>th</sup> June 1995 is the same as the suit property; and having found that the plot was lawfully allocated to the Plaintiff, the question that now arise is whether the same plot [now suit property], was available for allocation or re-allocation to the 2<sup>nd</sup> Defendant.
230. First and foremost, it is important to point out that after the Plaintiff herein had applied for allotment of the plot in question and subsequent to the issuance of the letter of allotment, the Plaintiff engaged and retained the services of one Enock Tuitoek, to assist with the process towards the registration of the allocated plot and issuance of a certificate of title.
231. To the extent that the Plaintiff had engaged the services of the said Enock Tuitoek, there is no gainsaying that the said Enock Tuitoek was therefore privy to and knowledgeable of the facts pertaining to the allotment of the designated plot in favour of the Plaintiff. At any rate, Enock Tuitoek wrote to the Plaintiff vide letter dated the 10<sup>th</sup> July 1997 and wherein same [Enock Tuitoek] sought to be given the original letter of allotment and original receipt for purposes of verification by the land office and with a view to facilitating issuance of title, obviously, in favour of the Plaintiff, now deceased.



232. Notwithstanding the foregoing, the same Enock Tuitoek wrote a letter on behalf of the 2<sup>nd</sup> Defendant dated the 16<sup>th</sup> October 1995 and wherein same was applying to the commissioner of lands to allocate the designated plot to the 2<sup>nd</sup> Defendant. Furthermore, the said Enock Tuitoek attached a copy of a sketch of the proposed site. [See exhibit P13].
233. Suffice it to point out that by the time Enock Tuitoek was [sic] making an application for allotment of the proposed site, which now comprises the suit property, same Enock Tuitoek and by extension the 2<sup>nd</sup> Defendant on whose behalf he was acting were knowledgeable and aware of the fact that the proposed site had previously been allocated to the Plaintiff.
234. Furthermore, it is not lost on the court that by the time the 2<sup>nd</sup> Defendant was applying to be allocated the suit property, through Enock Tuitoek, the suit property [proposed site], which forms the basis of the allotment was already private land, same having been duly allocated to the Plaintiff vide letter of allotment dated the 5<sup>th</sup> June 1995.
235. Suffice it to point out, that upon the issuance of the letter of allotment dated the 5<sup>th</sup> June 1995 and which was duly acted upon by the Plaintiff, the designated plot which is now the suit property, ceased to be an unalienated government land. In this regard, the commissioner of land could not purport to allocate or re-allocate the same plot to and in favour of the 2<sup>nd</sup> Defendant.
236. In this respect, it is my finding and holding that by the time the commissioner of land was issuing the letter of allotment dated the 26<sup>th</sup> October 1995 in favour of the 2<sup>nd</sup> Defendant, the plot that was purportedly being allocated was non-existent. In this regard, the allotment or purported allotment vide letter of allotment dated 26<sup>th</sup> October 1995 did not relate and/ or attach to any land.
237. At any rate, it suffices to underscore that allotment of land is a process in rem and thus must attach to an existing plot or piece of land. Consequently, where the allotment is issued in respect of a non-existent land, [like in the instant case], the allotment is in vacuum.
238. To this end, I beg to adopt and reiterate the holding of the Court of Appeal in the case of Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, where the court held and stated thus;

“ 25. In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land.

25. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5<sup>th</sup> respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.”

239. The foregoing position was revisited by the Court of Appeal in the case of Philemon L. Wambia v Gaitano Lusitsa Mukofu & 2 others [2019] eKLR, where the court observed and stated as hereunder;

“ 36. On our part, we have considered the evidence on record on the two letters of allotment. The evidence on record shows that the first allotment to the suit property was to Mr. Joseph Muturi Muthurania. In Benja Properties Limited



-v- Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, this Court stated that an allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land.

37. In the instant case, the second letter of allotment to the appellant did not attach in rem to any land since there was no parcel upon which the allotment could attach. The first allotment to Mr. Joseph Muturi Muturania effectively made the suit property unavailable for allotment to the appellant the more when the first allottee had fulfilled the terms and conditions of the allotment."

240. Flowing from the ratio decidendi obtaining in the decision [supra], there is no gainsaying that the letter of allotment dated the 26<sup>th</sup> October 1995, in favour of the 2<sup>nd</sup> Defendant, did not relate to an existing land. In addition, it suffices to underscore that the land which was purportedly being allocated was already alienated and was thus private land.

241. The fact that the land in question was not available for alienation/allotment to the 2<sup>nd</sup> Defendant was also amplified by DW2. In particular, DW2 [director of land administration], averred that the plot which was being allocated to in favour of the 2<sup>nd</sup> Defendant had already been allocated and thus same [plot] was private land.

242. For brevity, it suffices to reproduce the evidence of DW2 whilst under cross examination by learned counsel for the 2<sup>nd</sup> Defendant.

243. Same stated as hereunder;

The commissioner of lands is the one who issued the letter of allotment. I wish to add that the allotment of the land in favour of the 2<sup>nd</sup> Defendant was illegal. I also do wish to add that the plot at the time of allocation in favour of the 2<sup>nd</sup> Defendant was private land.

I also reiterate that the land had already been allocated. I repeat that the allotment in favour of the 2<sup>nd</sup> Defendant was irregular."

244. From the testimony of DW2, it is evident that the plot which was being allocated to and in favour of the 2<sup>nd</sup> Defendant was no longer an unalienated government land. For good measure, DW2 affirmed that the plot in question had already been alienated and was thus private land.

245. Other than the foregoing, there is evidence that the commissioner of land subsequently recalled the certificate of title that was issued to and in favour of the 2<sup>nd</sup> Defendant. To this extent, it suffices to reference the letter by the commissioner of land dated the 1<sup>st</sup> April 1998, which also attached a surrender instrument for execution by the 2<sup>nd</sup> Defendant.

246. During cross examination of DW3 by learned counsel for the Plaintiff same testified and stated thus;

I have availed evidence before the court as pertains to ownership of L.R No 209/12909. Referred to page 17 of the Plaintiff's bundle of documents and the witness states that the documents thereat is a letter from the commissioner of lands. The letter addresses the circumstances leading to allocation of the plot to the 2<sup>nd</sup> Defendant. The letter in question alludes to surrender of the certificate of title.



247. Whilst still under cross examination, DW3 stated as hereunder,
- the surrender was informed by the discovery of the facts that the 2<sup>nd</sup> Defendant had misrepresented facts to the commissioner of land."
248. Flowing from the evidence of DW3, there is no gainsaying that the certificate of title which was issued to and in favour of the 2<sup>nd</sup> Defendant was indeed recalled by the commissioner of land. At any rate, the basis upon which the said certificate of title was being recalled was highlighted by the commissioner.
249. In particular, it is worth recalling that the commissioner of land drew to the attention of DW2 that the representations which had hitherto been made by the 2<sup>nd</sup> Defendant and which underpinned the issuance of the letter of allotment and the subsequent certificate of title, turned out to be misleading and incorrect.
250. Simply put, the commissioner of land posited that the letter of allotment in favour of the 2<sup>nd</sup> Defendant was obtained on the basis of misrepresentation.
251. Arising from the foregoing, it is therefore my finding and holding that the issuance of the letter of allotment dated the 26<sup>th</sup> October 1995 as well as the subsequent certificate of title, were procured and obtained irregularly, illegally and unlawfully. In this regard, I hasten to posit that the certificate of title in respect of the suit property held by the 2<sup>nd</sup> Defendant is illegal, void and nullity ab initio.
252. Suffice it to underscore, that the mere possession of a certificate of tile, which was procured contrary to and in contravention of the established legal process, does not vest/confer any rights and/or interests on the bearer thereof. In this regard, the 2<sup>nd</sup> Defendant cannot be heard to contend that same is the lawful and legitimate proprietor of the suit property merely on the basis of possession of certificate of title.
253. Instructively, the process leading to the issuance of the title is critical. In this regard, when the certificate of title is under challenge, it was incumbent upon the 2<sup>nd</sup> Defendant to place before the court plausible and cogent evidence to underpin the veracity and legality of the certificate of title. Unfortunately, the 2<sup>nd</sup> Defendant herein fell short of the obligation cast upon her.
254. In the case of *Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019)* [2021] KECA 144 (KLR) (19 November 2021) (Judgment), where the court held thus;
4. The jurisprudence relied upon by the appellant and which we find prudent not to replicate are as already highlighted above. We have given due consideration to them in light of the record as assessed herein by us. Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme.
255. Furthermore, the significance of the process leading to the issuance of a certificate of title was similarly highlighted in the case of *Funzi Development Ltd & others v County Council of Kwale, Mombasa Civil Appeal No 252 of 2005* [2014] eKLR.
256. The Court of Appeal [as per Maraga JA] stated as hereunder;
- As I have pointed out, the 3rd respondent, relying on Section 23(1) of the Registration of Titles Act, Cap 281 of the Laws of Kenya, contended that the Grant of the suit land



conferred on it an absolute and indefeasible title. I hasten to point out that that Section refers to a certificate of title issued to a purchaser.

In the case of allocated land, even if the section is applicable, 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 give its seal of approval to an illegal or irregularly obtained title[emphasis supplied].

257. To my mind, the certificate of title over the suit property and which is held by the 2<sup>nd</sup> Defendant, cannot be deployed to claim indefeasibility. At any rate, this court has since found and held that by the time the letter of allotment was being issued in favour of the 2<sup>nd</sup> Defendant the designated plot stood alienated and was thus not available for alienation, whatsoever.
258. In view of the foregoing, my answer to issue number three is threefold. Firstly, the 2<sup>nd</sup> Defendant herein was privy to and knowledgeable of the fact that the plot, which now comprises the suit property had long been alienated to and in favour of the Plaintiff. For good measure, one Enock Tuitoek, who made the application for allotment on behalf of the 2<sup>nd</sup> Defendant, was privy to and knowledgeable of the Plaintiff's rights and interests to the designated plot. [See Section 2 of the Registration of Titles Act].
259. Secondly, by the time the plot, which now comprises of the suit property was being alienated to the 2<sup>nd</sup> Defendant, same [plot] was already alienated and was thus private land. In this regard, the allotment in favour of the 2<sup>nd</sup> Defendant was an act in futility. [See *Henry Muthee Kathurima v Commissioner of Lands & another* [2015] eKLR].
260. Thirdly, the certificate of title over and in respect of the suit property and which was issued in favour of the 2<sup>nd</sup> Defendant was procured contrary to and in contravention of the law. In this regard, the certificate of title is void and a nullity. Suffice it to underscore that nothing good can come out of an illegality, no matter how attractive it may be.
261. At any rate, it is also worth pointing out that the doctrine of *ex-nihilo-nihil-fit* [out of nothing comes nothing], holds sway in respect of the certificate of title held by the 2<sup>nd</sup> Defendant. [see *Mcfoy v United Africa Company Limited* [1961]. [see also *Caroget Investment Limited v Aster Holdings Limited & 4 others* [2019] eKLR].

**Issue Number 4. Whether the charge in favour of the interested party was contrary to the doctrine of *lis pendens* and if so, whether same is lawful or otherwise.**

262. During the pendency of the suit herein, which was filed on the 4<sup>th</sup> June 2001, the 2<sup>nd</sup> Defendant proceeded to and charged the title of the suit property and in favour of the interested party. For good measure, the charge in favour of the interested party was executed on the 21<sup>st</sup> August 2019 and thereafter registered at the land registry on the 27<sup>th</sup> August 2019.
263. Arising from the execution and subsequent registration of the charge in favour of the interested party, the interested party sought for and obtained leave of the court to be joined as an interested party. Pertinently, the basis upon the joinder of the interested party was because same was holding the title of the suit property as security on the basis of the banking facility advanced to the 2<sup>nd</sup> Defendant.
264. The question that does arise and which the court must grapple with relates to and concerns the propriety and validity of the charge held by the interested party and which charge, was admittedly executed and registered during the pendency of the suit.



265. Put differently, the question that does arise relates to the implication of the doctrine of lis-pendens as pertains to any action or activity that is taken by a party to a suit during the pendency of the suit and whose import it to alienate, dispose of and/or decimates the substratum of the suit.
266. To my mind, the 2<sup>nd</sup> Defendant, who was aware of the pendency of the suit was barred and prohibited by the doctrine of lis-pendens from offering the title of the suit property as security to the interested party. In this regard, it is my finding and holding that the charging of the suit property was a deliberate and intentional action by the 2<sup>nd</sup> Defendant to defeat the suit beforehand.
267. In my humble view, such kind of endeavour must be frowned upon at all cost.
268. As pertains to the extent and scope of the doctrine of lis-pendens, it suffices to reiterate the holding of the court of appeal in the case of Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR, where the court stated as hereunder;

“Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L.J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows:-

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In the case of Mawji v US International University & another [1976] KLR 185, Madan, J.A. stated thus:-

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

In the same case at page it was observed inter alia that:-

“Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

See also the considered views of Nambuye J, (as she then was) in Bernadette Wangare Muriu v National Social Security Fund Board of Trustees & 2 Others [2012] eKLR.

The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of section 52 of the ITPA by the *Land Registration Act* (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case.



269. Furthermore, the significance of the doctrine of Lis-pendens was revisited by the court of appeal in the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR

50. As to whether there is any interplay between statutory power of sale and the doctrine of lis pendens; the Black's Law Dictionary defines lis pendens as the jurisdiction, power or control acquired by a court over property while a legal action is pending.

The Supreme Court of India in the case of KN Aswathnarayana Setty (D) Tr. LRs. & Others v. State of Karnataka & Others [2013] INSC 1069 stated that the doctrine is based on the legal maxim 'ut lite pendente nihil innovetur' (During a litigation nothing new should be introduced). The doctrine is couched equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail.

51. Our previous land legislation regime expressly embraced the doctrine under Section 52 of the repealed (Indian) Transfer of Property Act (ITPA) 1882 by stipulating that:

“During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.” Emphasis added.

52. Do courts still recognize the doctrine? The ITPA was repealed by the Land Registration Act (LRA) Number 3 of 2013; whose Section 107 (1) of the LRA provides for the saving and transitional provisions of the Act, and provides that:-

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

53. Presently, the LRA does not prohibit the application of the doctrine of lis pendens; nor does any law for that matter. For this reason and in view of Section 107 aforesaid, this Court has previously held that the doctrine of lis pendens is still applicable to this day, albeit under common law (see. Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR).

270. Flowing from the legal implications of the doctrine of Lis-pendens, it is my humble view, that the charge over and in respect of the suit property, which was executed and registered during the pendency of the suit herein is vitiated by the doctrine of Lis-pendens.



271. At any rate, it is not lost on the court that IW 1 [interested party's witness] stated that had the interested party been aware of the pendency of the suit same [interested party] would not have granted the facility in question.

272. For good measure, IW 1 stated as hereunder whilst under re-examination.

I do confirm that the interested party was not aware of the suit herein furthermore, I wish to add that if the interested party was aware of the suit herein, we would not have granted the facility.

273. My understanding of the foregoing testimony is to the effect that the existence of this suit would have defeated the grant of the banking facility. However, it appears that the 2<sup>nd</sup> Defendant procured and obtained the banking facility on the basis of concealment or non disclosure of material facts.

274. Other than the doctrine of lis-pendens, I have posited elsewhere herein before the 2<sup>nd</sup> Defendant did not accrue and/or acquire any lawful estate, rights and/or interests to and in respect to the suit property. For good measure, I have highlighted that the certificate of title held by the 2<sup>nd</sup> Defendant and which was subsequently charged in favour of the respective party, was illegal and void.

275. The question that does arise from the foregoing is whether the interested party herein can contend that same has a valid security on the face of the finding and holding that the certificate of title is null and void. However, in my humble view, the answer is in the negative.

276. Suffice it to state that nullity begets nullity. Illegality begets illegality. Nothing good can come out of an illegality, no matter how attractive it may be. In this respect, I find and hold that the charge in favour of the interested party is null and void and hence same does not confer upon the interested party any lawful or legal rights to the suit property.

277. Before departing from the issue herein, it is apposite to recall and reiterate the dictum in the case of Benjamin Leonard Mcfoy v United Africa Company Limited [1961] ALL ER 1169 where it was stated thus:

“If an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order to set aside. It is automatically null and void and 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.....”

278. Simply put, the interested party herein cannot lay a claim to the certificate of title and the interest arising therefrom yet the impugned certificate of title is invalid. In this respect, there is no gainsaying that the charge held by the interested party is similarly invalid.

279. To buttress the foregoing position, it suffices to cite and reference the holding of the Court of Appeal in the case of *Telposta Pension Scheme Registered Trustees V Intercountries Importers And Exporters Limited & 6 Others Nairobi Civil Appeal No. 293 Of 2016* [UR], where the court stated and observed thus;

(114) On the same premises, the allocation to Park Investments having been irregular and illegal, Park Investments had no valid legal interest in the suit property that it could secure to the Bank, and the Bank had no valid legal interest that it



could pass to Intercountries Limited. The title held by Intercountries Limited is worthless. Its remedy can only lie against the Bank."

280. In the premises, my answer to issue number four is twofold. Firstly, the charge registered in favour of the interested party was perfected during the subsistence of the suit. Same is therefore vitiated by the doctrine of Lis-pendens.
281. Secondly, it is also common ground that the charge in favour of the interested party could only hold sway if the certificate of title that was offered as security was lawful, legal and valid. However, as pertains to the certificate of title beforehand, same was vitiated to the core.
282. In short, the certificate of title is a nullity and hence no legal rights can emanate and/or arise from.

### **Conclusion:**

283. Arising from the discussion [details highlighted in the body of the judgment], it must have become crystal clear that the suit plot, which now comprises of the suit property was lawfully allocated to and in favour of the Plaintiff. Furthermore, the Plaintiff thereafter proceeded to and complied with the terms of the allotment.
284. Nevertheless and despite the fact that the suit property had been duly allocated to the Plaintiff, the commissioner of land purported to re-allocate the plot to and in favour of the 2<sup>nd</sup> Defendant. For good measure I have found and held that the second allotment and the consequential issuance of the certificate of title in favour of the 2<sup>nd</sup> Defendant was invalid.
285. Finally and before venturing to proclaim the final orders, there is one more issue worthy of mention. The issue relates to the submissions by the Interested Party and wherein same [Interested Party] sought to have the Plaintiff's suit to be dismissed with costs.
286. Suffice it to point out that an Interested Party who has been joined into the suit cannot seek to have the Plaintiff's suit dismissed. In this regard, the prayer at the foot of the Interested Party's submissions, is respectfully, erroneous. [See Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others [2014] eKLR, at paragraph 27 thereof].

### **Final disposition:**

287. In view of the foregoing, there is no gainsaying that the Plaintiff herein has been able to establish and prove her claim to the requisite standard. Consequently, and in the premises, I proceed to and do hereby enter judgment in favour of the Plaintiff in the following terms;
- i. A declaration be and is hereby made to the effect that the Plaintiff was lawfully allotted the proposed extension to L.R No. 209/8762/2 at the foot of the letter of allotment dated the 5<sup>th</sup> June 1995.
  - ii. A declaration be and is hereby made to the effect that the plot which was allocated to and in favour of the Plaintiff at the foot of the letter of allotment dated the 5<sup>th</sup> June 1995 is the same as the plot which was subsequently allocated to the 2<sup>nd</sup> Defendant culminating to the issuance of the certificate of title in respect of L.R No. 209/12909.
  - iii. A declaration be and is hereby made that the Defendant's subsequent allotment and issuance of grant number I.R No. 67995/1, L.R No. 209/12909 and consequent deprivation of the Plaintiff of the land was fraudulent, erroneous and a nullity.



- iv. The certificate title in respect of I.R No. 67995/1, L.R No. 209/12909 be and is hereby revoked, cancelled and/or nullified.
- v. The deed plan number 201875 underpinning the certificate of title in respect of L.R No. 209/12909 be and is hereby revoked, cancelled and/or nullified.
- vi. The Chief land registrar be and is hereby ordered and directed to recall the certificate of title and in particular I.R No. 67995/1, L.R No. 209/12909 for cancellation.
- vii. Furthermore, the cancellation of certificate of title I.R No. 67995/1, L.R No. 209/12909 shall be gazetted by the chief land registrar in the Kenya gazette albeit at the expense of the Plaintiff herein.
- viii. The charge registered by the interested party over and in respect of I.R No. 67995/1, L.R No. 209/12909 be and is hereby nullified.
- ix. The chief land registrar be and is hereby ordered to process and issue the requisite certificate of title/grant in respect of the suit property in favour of the Plaintiff in compliance with the terms of the letter of allotment dated the 5<sup>th</sup> June 1995 and whose terms were duly complied with by the Plaintiff.
- x. The Plaintiff be and is hereby awarded costs as against the 2<sup>nd</sup> Defendant.
- xi. The costs incurred by the Interested party shall be borne by the 2<sup>nd</sup> Defendant.
- xii. The 1<sup>st</sup> Defendant shall however bear own costs of the suit.

288. It is so ordered.

**DATED, SIGNED AND DELIVERED ON THE 16<sup>TH</sup> DAY OF SEPTEMBER 2024**

**OGUTTU MBOYA**

**JUDGE.**

In the presence of:

Benson – Court assistant

Mr. Edmond Wesonga for the Plaintiff

Mr. Allan Kamau [principal litigation counsel for the 1<sup>st</sup> Defendant]

Ms. Purity Makori for the 2<sup>nd</sup> Defendant

Mr. Mutua Molo for the Interested Party

