



Registered Trustees of Sheik Bayed Bin Sultan Al Nahyan v Pelican Engineering & Construction Company Limited & 4 others (Environment & Land Case 639 of 2015) [2024] KEELC 6534 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 639 OF 2015
LN MBUGUA, J
OCTOBER 3, 2024**

BETWEEN

THE REGISTERED TRUSTEES OF SHEIK BAYED BIN SULTAN AL NAHYAN PLAINTIFF

AND

PELICAN ENGINEERING & CONSTRUCTION COMPANY LIMITED 1ST DEFENDANT

THE CHIEF LANDS REGISTRAR 2ND DEFENDANT

THE CHAIRMAN, NATIONAL LAND COMMISSION 3RD DEFENDANT

THE COUNTY SECRETARY NAIROBI CITY COUNTY 4TH DEFENDANT

THE TRUSTEES, KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME 5TH DEFENDANT

JUDGMENT

Background

- At the heart of the dispute is a parcel of land identified as L.R No. 209/11522 (hereinafter the suit property) situated at upper hill area in Nairobi county whose ownership is being claimed by three entities that is; the plaintiff, the 1st defendant and the 5th defendant. The background of the dispute is well captured in the ruling of this court delivered on 16.2.2018, nevertheless for purposes of bringing to speed the historical aspect of the dispute, the court will lay out the background all over again.
- Three parties in this suit; the plaintiff, the 1st defendant, and the 5th defendant, lay claim of ownership to the same piece of land, situated in Upper Hill, Nairobi City County. The plaintiff's claim of ownership is predicated on a letter of allotment for an unsurveyed plot dated 22/1/1990 and a resultant Grant



I.R 54999 registered on 28/2/1992 which is said to be delineated on survey plan No. 160806 dated 26/2/1992 for parcel L.R. No. 209/11552 measuring 0.4029 hectares.

3. The 1st defendant's claim of ownership is predicated on a letter of allotment dated 5.1.1991 for a Residential Plot L.R. No. 209/11552 and a resultant Grant registered on 13.12.2015 as I.R No. 161414 comprising of L.R No. 209/11552 delineated on survey Plan No. 162482 dated 15.2.1992 measuring 0.3120 hectares. It is to be noted that whereas the land reference number for both titles is the same, the sizes (acreages) are different and so are the survey plans.
4. The 5th defendant claims the suit property on the basis that there was an original title parcel L.R.209/6525 (hereinafter the mother title) measuring 6.88 acres which was owned and registered in the name of the General Manager of the East African Railways & Harbours Administration on 12.3.1965, and that the said land was subsequently vested to the 5th defendant via a legal Notice No.169 of 2006. They contend that the suit land is part of parcel of L.R.209/6525.
5. In their quest to assert their claim of ownership upon the suit land, the 5th defendant filed the case ELC 302 of 2015 against the current plaintiff. However, vide a consent order of 3.3.2020 (page 141 of the hand written proceedings), the said case was stayed pending the outcome of this suit.
6. There is yet another case JR No. 11 of 2018 in which the exparte applicants Cecilia Chepkoech Leting, Maureen Chepkoech Leting and Antonio Kipkoech Leting as executors of the Estate of Joseph Arap Leting are claiming ownership to a parcel of land L.R. No. 209/6506/1, which land was allocated to Joseph by the Commissioner of lands via the letter of allotment dated 14.11.1988. The Exparte Applicants filed the Judicial Review proceedings against the National Land Commission, claiming that their land was private land. This suit appears to have been consolidated with the current file, but vide the consent dated 3.3.2020 in the current suit, an order of de-consolidation was made. However, this court gave a ruling on 22.2.2024 to the effect that "for the sake of harmony and sanctity of decisions, the court will deliver the judgment herein (read JR 11 of 2018) simultaneously with the judgment in the case 639 of 2015". This position still stands.

The pleadings

7. Vide a plaint dated 6.7.2015, the plaintiff sued the 1st - 4th defendants claiming ownership and possession of the suit property as from 28.2.1992, but the file at the lands registry had gone missing. That on 20.4.2015, the suit land was invaded by the 1st defendant.
8. The plaintiffs therefore sought the following orders;
 - a. A declaration that the Plaintiff is the Legal Owner of the Property known as Land Reference Number 209/11552, Nairobi;
 - b. A declaration that the invasion of the said Land by the Defendants, their agents, employees and/or servants and the subsequent evictions and demolitions thereupon was unlawful;
 - c. A permanent prohibitory injunction do issue against the 1st defendant against any interference with the Plaintiff's Property Land Reference Number 209/11552, Nairobi and its enjoyment thereof;
 - d. A permanent injunction restraining the 4th defendant from approving and registering any change of Rate Payer in the Rates Register to the detriment of the plaintiff;
 - e. Damage appurtenant to the demolition of the perimeter as shall be assessed by a valuer;
 - f. General damages for the trespass;



- g. Interest on (e) and (f) above at court rates;
 - h. Costs of this suit;
 - i. Any other relief that this Honourable Court may deem fit to grant.
9. The plaint was amended on 13.10.2020 bringing on board the 5th defendant.
10. 1st defendant filed a statement of defence and counter-claim dated 29.11.2017 where they claim to be the legitimate owner of the suit parcel L.R.209/11552, having been allotted the same on 5.1.1991. They contend that the fraudulent transactions on the suit land by the plaintiff and the Chief Land Registrar is intended to deprive them of their property. They therefore seek the following orders in the counter claim.
- a. An Order of injunction restraining the Plaintiff herein whether by themselves, their agents, servants, employees, invitees and/or otherwise whomsoever from entering upon or trespassing, constructing or continuing with the construction of any structures, offering for sale, selling, disposing of, charging, sub-dividing, dealing, alienating, occupying, managing, letting or otherwise using, residing and remaining or representing any person as the duly registered owner or in any way whatsoever from interfering with the Plaintiff's proprietary rights including the right to quiet possession and enjoyment over all the piece of land known as L.R. No. 209/11552 situate in the city of Nairobi at the junction of lower hill road and Haile Selassie Avenue.
 - b. A declaration that the 1st defendant herein is the legitimate and registered owner of parcel of land known as L.R. No. 209/11552 situate in the City of Nairobi.
 - c. A declaration that the purported title registered in the name of the Plaintiff was fraudulent and hence illegal null and/or void in the first instance.
 - d. A declaration that parallel Title over L.R. No. 209/11552 was fraudulent and hence illegal null and/or void in the first instance and all entries therein are fraudulent, null and void.
 - e. General damages for conspiracy and fraud.
 - f. Costs of the suit.
 - g. Interest on (e) and (f) at Court rates.
11. The defence of the 2nd defendant (The Attorney General) is dated 12.9.2019 where they deny the claim of the plaintiff as set out in paragraph 6 of the plaint. It is worthy to note that during the hearing of the case, the 2nd defendant recognized the claim of the plaintiff as the legitimate one. The 2nd defendant does admit that their file in respect of the suit land had gone missing. They are also aware of the related suit being ELC no. 302 of 2015 filed by the 5th defendant herein.
12. The 3rd defendant (National Land Commission) did file an undated defence on what appears to be 21.2.2020. They similarly deny the claim of the plaintiff as set out in paragraph 6 of the plaint, adding that the prayers sought in the plaint cannot be issued against them. The 3rd defendant did not call any witnesses during the trial.
13. On 7.12.2021, the case against the 4th defendant (County Government of Nairobi) was withdrawn.
14. The 5th defendant filed a statement of defence dated 6.7.2017 where they deny plaintiff's claim as set out in paragraph 6 of the plaint. By then, it is not clear if they were properly on record as the amended plaint bringing them on board was only fled on 13.10.2020. They aver that they are the lawful



owners of the suit property which was part of parcel L.R.209/6525. They further contend that the suit parcel is a purported sub division of LR No. 209/6525 (PART) which land was initially transferred to Kenya Railways Corporation by the East African Railways and Harbours Administration. That in consideration of unpaid pension dues to over 10,000 aging retirees of the Corporation, Kenya Railways Corporation via legal Notice No. 169 of 7.9.2006 transferred and vested land parcel No. LR No. 209/6525 (part) to the 5th defendant.

15. That since 2006, the 5th defendant had enjoyed quiet possession of the suit property until April, 2015 when the plaintiff through its agents and /or servants laid claim on a portion of the property prompting the 5th defendant to file the case ELC No. 302 of 2015 to protect their rights. However, without disclosing the existence of the said suit and the 5th Defendants interests in the suit property, the plaintiff discretely filed this claim, but the 5th defendant successfully applied to be joined to these proceedings.
16. They further contend that any purported subdivision of the mother title L.R.209/6525 was fraudulent, of which the National Land Commission deliberated on the matter culminating in a decision for revocation of the unlawful title in favour of the 5th defendant.
17. The 5th defendant did not call any witnesses during the trial.

The Evidence

Case for the Plaintiff

18. The case of the plaintiff was advanced by two witnesses, PW1 being ABU BAKAR HASSAN. He adopted his witness statement dated 25.11.2021 as his evidence in chief (to be found at page 19-26 of plaintiff's trial bundle). He also produced the documents in their amended list dated 17.4.2020 as P-Exhibit 1-7 (Note the amended list at page 32-35 of plaintiffs trial bundle (blue pagination) has 32 items. He also produced a supplementary list of documents dated 1.12.2021 with 27 items as P-Exhibits 8-35. This list is to be found at page 155-157 of plaintiffs bundle, though that last page (157) is upside down.
19. PW1 introduces himself as a trustee and secretary to the board of the plaintiff. He contends that on 22.1.1990, the President of the Republic of Kenya through the Ministry of Foreign Affairs allotted to the Plaintiff, as a gift to the President of the United Arab Emirates, the then property known as an unsurveyed Plot No.A-Upper Hill, Nairobi under Plan No. 44805/IV/220A for purposes of putting up a commercial building to generate revenue to run the Orphanage established by the Plaintiff in Mombasa as part of its non-profit making charity project.
20. Thereafter, the said allotment to the plaintiff was done under the authority to allocate, Government Ref. No. 44805/IV/220.
21. That the plaintiff accepted the offer vide their letter dated 19.2.1990. Thereafter, the whole registration was conducted through the ministry of foreign affairs culminating in the issuance of a title to the plaintiff for parcel L.R. No. 209/ 11552 on 28.2.1992. PW1 contends that the president of United Arab Emirates Sheik Zayed Bin Sultan Al Nahyan retained the custody of all the original documents and only forwarded the photocopies of the same to the plaintiff's foundation in Mombasa, and that upon his demise, attempts to recover the said original documents were futile.
22. That upon registration, the plaintiffs took possession of the suit property and have been paying land rates.
23. That sometime in year 2015, strangers started trespassing upon the suit land. Thus plaintiff set out to build a perimeter wall to keep off the trespassers. However, the 1st defendant invaded the suit land



- demolishing the perimeter wall on 20.4.2015, and on 11.5.2015, they were shocked to learn that the 1st defendant was applying to be registered as the rate payer of the suit property. The plaintiffs reported the matter at Capital hill police station but they did not get any assistance as the police refused to interfere.
24. PW1 further avers that a complaint was lodged by the 5th defendant to the National Land Commission, and in a clear error of facts and law, the Commission delivered its ruling where they ignored the fact that the mother title L.R 209/6525 had been surrendered to the Government of Kenya. PW1 admits that the 5th defendant herein did sue them in the case ELC 302 OF 2015 claiming the same property.
 25. Upon cross examination by the 1st defendant, PW1 averred that he was not present during the acquisition of the property as he was born in 1978, he got the information about the land from one Edward Munoko Wafula, a Senior Land Registration officer (DW2), and from their legal team. He identifies the plaintiff as a registered trust. He reiterated that the plaintiff got the letter of allotment on 27.1.1990 in the name of Sheik Zayed Bin Sultan Al Mahyan of which the letter of acceptance was made on 19.2.1990 by the Director General of the plaintiff's foundation through the Arab Fund for Economic Development.
 26. PW1 avers that at the time of allocation of the land to the plaintiff, the said land was available for allocation, but conceded that the surrender of the title should have come before the allotment, adding that the surrender occurred on 2.8.1991.
 27. PW1 further stated that he thinks the plaintiff complied with the conditions set out in the letter of allotment, even though they have no building plans. He asserted that they were in possession of the suit property, of which they had constructed a perimeter wall. He conceded that they had not developed the property.
 28. Upon cross-examination by the 2nd defendant (The Attorney General), PW1 stated that the change of user from residential to offices is not something he is aware of, but he is aware of the change of hands of the land from East African Railways to the plaintiff, adding that the title they have has never been recalled by the government. PW1 contends that their grievance with the Chief Land Registrar is that the 1st defendant is claiming the same land and has a title too.
 29. On cross-examination by the 3rd defendant (National Land Commission), PW1 stated that he was not aware that Kenya Railways had a previous title to the land. He added that they sued National Land Commission because the latter had made a decision on the matter in favour of the 5th defendant.
 30. On cross-examination by the 5th defendant, PW1 stated that the National Land Commission had made a ruling that the mother title L.R.209/6525 belonged to the 5th defendant. He reiterated that their allotment occurred in 1990, the surrender in 1991, and they got their title in 1992.
 31. In re-examination, PW1 stated that they made inquiries with the land Registrar and learnt that some documents were missing and that the 1st defendant was claiming the land.
 32. PW2 is one SULEMAN ABDULSHAKUR HARUNANI. He introduced himself as a licensed land surveyor running his own firm known as Harunani and associates. He produced the report dated 17.4.2020 as an exhibit for the plaintiff, the same is to be found at page 27-31 of plaintiff's trial bundle. His evidence is by and large opinion evidence whereby he finds fault in the claim of the 1st defendant when compared to the claim of the plaintiff.
 33. Upon cross-examination by the 1st defendant, he stated that the plaintiff is his client, but he wouldn't know who the registered trustees of the foundation are. He knows that there are situations where there are multiple titles for the same land and that survey records can change legally and illegally. That for the case at hand, there are two deed plans for the same land. The one for the 1st defendant is no. 162482



- at page 169 of plaintiffs bundle for parcel 209/11552 and it measures 0.3120 hectares, and it is similar to the one at page 37 (actually it is at page 38) of 1st defendant's bundle. He contends that for the document at page 169 of plaintiffs bundle, he got it from government survey.
34. He is aware that the 1st step in allocation of a property is the making of an application, and in the case at hand, a request was made by Sheik Zayed to the president of Kenya, but he doesn't have that application for allotment.
 35. PW2 contends that the title at page 54 of plaintiffs bundle shows that parcel L.R.209/6525 was already surveyed, but the letter of allotment for plaintiffs land indicated that the parcel was un-surveyed. He clarified that land can keep on being re-surveyed. He also stated that the surrender of the mother title did not indicate that the purpose for the surrender was to facilitate the hiving off of the suit land. He avers that as per the decision of the National Land Commission, the suit land title was to be revoked, but that National Land Commission has made wrong decisions so many times.
 36. Upon cross-examination by the 2nd defendant, PW2 stated that when the land was allocated to the plaintiff, it was not defined, but the acreage was 0.4 ha. which was an approximation. He contended that before a surrender, there is an intention. Adding that it was possible to have a letter of allotment before surrender, because the allotment was an intention. He contends that the land which was being allocated to the plaintiff on 22.1.1990 was the one which was being surrendered in 1991. He further stated that the document at page 185 of plaintiff's bundle was a Part Development Plan (PDP) but the number is obliterated.
 37. On deed plans, PW2 averred that he has not submitted any documents to show how deed plans are generated or how that procedure is done. He never wrote to lands office to authenticate the letters of allotments. And he never wrote to the director of survey to get certified copies of the documents. He never appeared before National Land Commission on the matter.
 38. On cross-examination by the 5th defendant, PW2 stated that due process was followed in the allocation of the land to the plaintiff.
 39. In re-examination, PW2 stated that the deed plan for the plaintiff is no.160806 dated 26.2.1992 and is at page 168 of plaintiff's bundle, while there was another deed plan at page 169 of plaintiff's bundle dated 15.2.1992 and is number 162482. He stated that in his ten years in survey department and 3 years in signing deed plans, this kind of scenario was not possible. He avers that the mess could not have happened if the last survey done for Sheik Zayed had been taken into consideration.

Case for the 1st Defendant

40. The case for the 1st defendant was advanced by one witness DW1 namely BERNARD NJAU MUNGAI. He adopted his witness statement dated 29.11.2017 as his evidence. He produced the 8 documents in their list dated 1.7.2022 as their D-Exhibits 1-8. Dw1 avers that he is the administrator manager of the 1st defendant, and that their company is the bonafide registered owner of the suit land, having been allocated the same via the letter of allotment dated 5.1.1991, but they only got the title in year 2015.They have been paying the requisite land rates and rent for the suit property.
41. DW1 contends that on 13.4.2015, they obtained permission from the Nairobi city County to put up a fence, and they enjoyed quiet possession of the land until year 2017 when the 5th defendant illegally moved into the property. He contends that the plaintiff has never been in occupation of the suit land. He further states that the land being claimed by the plaintiff is different in size from that of the 1st defendant, hence plaintiff may not be referring to the same property.



42. In cross examination by the plaintiff, DW1 stated that he would not know if the date of 5.1.1991, the date of their allocation for the land was a Saturday. He conceded that their letter of allotment had reference no. 44805/iv for Residential plot no. 209/11552. He is not aware that such a parcel did not exist by the date of 5.1.1991. He is also not aware that the said land was birthed by survey plan no. 218/48 of 17.12.1991.
43. DW1 contended that he had no acceptance letter in respect of the allotment, he has no evidence of payment of stand premium and they did not comply with the special conditions set out in the allotment.
44. He avers that their deed plan is no. 162482 dated 15.2.1992 to be found at page 7 of their bundle measuring 0.312 ha, while at page 168 of plaintiff's bundle, there is a deed plan for the plaintiff and is no. 160806 dated 26.2.1992 for 0.4029 ha.
45. Upon cross examination by the 2nd defendant, Dw1 stated that he has worked for the 1st defendant since 1985, thus he is conversant with the dispute at hand. He reiterated that they got the title on 6.3.2015 for the suit property but he doesn't know why the issuance of the title delayed. Adding that they were allocated an already surveyed property L.R. No. 209/11552, but he doesn't know when the land was surveyed.
46. He avers that they have been in possession of the suit land, but they have not done much.
47. On cross examination by the 3rd defendant, DW1 stated that they sued the National Land Commission because the latter was claiming that the land doesn't belong to them (1st defendant).
48. On cross-examination by the 5th defendant, DW1 averred that they got their title in year 2015 and they were not aware that Kenya railways had transferred the land to them (5th defendant) via a legal notice no.169 of 2006, nor were they aware that the 5th defendant was in occupation of the land. He contends that they got a letter dated 13.5.2015 from the lands ministry indicating that they (1st defendant) owned the land, but the plaintiff was claiming the same land too.
49. In re-examination, DW1 reiterated that their letter of allotment had the L.R. No. 209/11552 with an area of 0.3120 ha. He averred that the document at page 4 of their bundle shows the date of presentation as 13.12.2013. He further stated that the interests in the allotment letter runs for 99 years as indicated in the title and that the said term has not expired. He emphasized that their deed plan was duly signed by the Director of survey and that their title was properly registered and they would not have been issued with these documents if there were any outstanding liabilities and no one has ever explained to them why there are multiple titles.

Case for the 2nd Defendant

50. The case for the 2nd Defendant was advanced by two witnesses, a Land Registrar by the name EDWIN MUNOKO WAFULA (DW2), and GORDON ODEKA OCHIENG (DW3) who works in the department of land administration in the ministry of lands. DW1 adopted his witness statement dated 18.11.2019 as his evidence. He produced the 19 documents in their list dated 12.9.2019 as their D-Exhibits 1-19. (It is noted that the list of documents of the 2nd defendant dated 12.9.2019 has 23 and not 19 items).
51. DW2 contends that from their records, the only evidence of registered grant is IR.54999/1 LR.209/11552 measuring 0.4029 hectares in favour of the Registered Trustees of Sheikh Zayed Bin Sultan Al Nahyan. That parcel LR. 209/11552 came about as a result of survey of an unsurveyed plot allocated to the Registered Trustees of Sheikh Zayed Bin Sultan Al Nahyan vide letter of allotment



- ref.44805/IV/223 dated 22.1.1990 and henceforth, the suit parcel became private land and was therefore not available for alienation to any other party.
52. THAT from their records, there is a memorandum of registration of Transfer of Lands which was presented to the Registrar of Titles on 28.2.1992 and it was duly registered and grant issued in favour of the Registered Trustees of Sheikh Zayed Bin Sultan Al Nahyan.
53. At paragraph 18 of his witness statement, Dw2 has given the history of the land as follows;
- i. That LR. 209/6525 registered at the lands title registry at Nairobi as IR. 20605 was registered in the name of the General Manager of the East African Railways Harbours Administration.
 - ii. The land was leased from the Government of the Republic of Kenya for a term of 99 years with effect from 1st January, 1932. The user of the land was given as residential purposes and the annual rent was peppercorn.
 - iii. That in 1969, LR. 209/6525 was by virtue of a Vesting Order vested in the East African Railways Corporation. The Vesting Order was registered at the Land Titles Registry at Nairobi on 5.9.1969.
 - iv. That on 2nd August, 1991, LR. 209/6525 registered as IR. 20605 was surrendered to the Government of the Republic of Kenya and the surrender document was registered as IR. 20605/2 on the said date.
 - v. That LR. 209/6525 having been surrendered to the government of the Republic of Kenya on 2nd August, 1991 became Government land from that date and the government had all the rights to deal with the land as it deemed fit.
54. DW2 further contends that the alleged grant IR. 161414 LR. 209/11552 in favour of Pelican Engineering Construction and Company Limited does not have supporting documents at the Land Registry and has no correspondence file either, and that the allotment is alleged to have been issued on a Saturday which is not a working day in Government.
55. DW2 avers that inquiries were made to the Chief Land Registrar by plaintiff's advocate via their letters dated 7.6.2015 and 16.6.2015, as well as by the Director of Criminal Investigations vide their letter of 22.6.2015 regarding the records of the Grant for parcel L.R. 209/11552. In response thereof, vide a letter dated 8.7.2015, the Land Registrar confirmed that the deed file was missing. Thereafter, in a letter dated 10.7.2015, the Land Registrar wrote to the plaintiffs advocates advising them on the procedure of reconstruction of the deed file.
56. Upon cross-examination by the plaintiff, DW2 stated that the land Registrar confirmed that as at 10.7.2015 the plaintiff was the registered owner of the property as per the last search done.
57. Upon cross-examination by the 1st defendant, DW2 stated that they had the records of the suit land, but he had not seen the original records. That the file was missing, and they reconstructed the same from the documents given to them by the plaintiff and that he didn't bring to court this reconstructed file. He averred that if the land is titled, it is not available for allocation as that would amount to double allocation.
58. He also stated that he was not aware that the suit land was previously registered in the name of Kenya Railways corporation. On surrender, he averred that the same is effective from the point of registration, adding that the letter of allotment of 22.1.1990 could not have been issued over titled land and that the proper allocation is the one coming after the surrender.



59. DW2 stated that he didn't look at the file of Pelican (1st defendant) because he didn't see one. Nevertheless, the documents of the 1st defendant at page 35-38 of their bundle have been certified as true copies of the original, adding that a memorandum of registration is evidence of actual registration. Similarly, the survey plan dated 15.2.1992 has a signatory of the Director of survey.
60. On cross-examination by the 5th defendant, DW2 stated that at the time of allocation of the suit land, the land was public land.
61. In re-examination, DW2 stated that he didn't interrogate the letter of allotment issued to the 1st defendant and he cant tell if it came after the surrender. He reiterated that the ministry just undertook the reconstruction of the file.
62. DW3 GORDON ODEKA OCHIENG stated that he has worked with the ministry of lands since 1989 and he is currently the Director Land administration. He adopted his witness statement dated 18.11.2019 as his evidence where by and large, his evidence mirrors that of DW2. He also produced the 47 items in their bundle dated 18.11.2019 as 47 exhibits.
63. His testimony is that parcel LR 209/11522 was allocated as an unsurveyed plot vide a letter of allotment ref. 44805.IV/223 dated 22nd January, 1990 to the Registered Trustees of Sheikh Zayed Bin Sultan al-Nahyan. The plot which measured 0.40 hectares was allocated for a term of 99 years with effect from 1st January, 1990. Thereafter a Grant (Title) in respect of L.R. 209/11552 Deed Plan No. 160806 was prepared in favour of the Registered Trustees of Sheikh Zayed Bin Sultan Al Nahyan. The said grant was executed by the then Commissioner of Lands (Wilson Gacanja) on 29th February, 1992 and the same was registered at the Land Title Registry at Nairobi as IR. 54999 on 28th February, 1992. The title registered as IR. 54999 is intact.
64. DW3 avers that the purported allocation of the suit land to the 1st defendant is irregular as the land had already been allocated to the plaintiff and was therefore not available for allocation.
65. Upon cross-examination by the plaintiff, DW3 reiterated that the suit property is registered in the name of the plaintiff and he is not aware if the 5th defendant was ever registered as the owner of the suit land, adding that Saturday is not an official day, thus documents prepared on such a date are not authentic.
66. On cross-examination by the 1st defendant, DW3 stated that since they are the custodians of records, courts rely on those records as gospel truth. For the information he gave the court, his reference was the correspondence file. He contended that the allocation of titled land would be invalid. He averred that as at 22.1.1990, the suit land was private property and it should not have been available for allocation since the deed of surrender by Kenya Railways was made on 15.7.1991.
67. DW3 further stated that the letter of allotment did not have PDP since the land was private. That the stand premium was paid by the ministry of foreign affairs, but the allocation was to an individual. Adding that there was no advertisement over availability of the suit land. He avers that the title of the 1st defendant at page 5-8 of their bundle appears to be certified and was signed on 13.12.2013.
68. On cross examination by the 3rd defendant, DW3 stated that, as per their records, he came across only one letter of allotment issued by the Commissioner of lands and the only issue with it is that it was issued before the surrender by Kenya Railways.
69. In re-examination, DW3 contended that he could not authenticate the signatures on 1st defendant's title (page 8 of 1st defendants bundle). He reiterated that at the point of allocation, the suit land belonged to Kenya Railways.



Case for the 3rd defendant

70. On 20.2.2023, the 3rd defendant informed the court that they would not call any witnesses.

Case for the 5th defendant

71. Similarly on 20.2.2023, the 5th defendant indicated that they would not call any witnesses.

Submissions

72. The plaintiffs submissions are dated 16.2.2024 where they raised the following issues;

- a. Whether the plaintiff has discharged the burden of proof to the requisite standard,
- b. Whether the evidence of 1st defendant has probative value,
- c. Whether the plaintiff should be granted the relief sought in the amended plaint.

73. It is submitted that the case of the plaintiff before the court is one of safeguarding its right to property under article 40 of *the constitution* which is under serious threat of violation as a result of the 1st defendant's callous and malicious attempt to fraudulently and illegally steal plaintiff's property. The plaintiffs have rehashed their evidence contending that they were lawfully allotted the suit property, that they have a title to that effect and that they are in occupation of the same land. They aver that without any shadow of doubt, the plaintiff has demonstrated that the Grant to the suit property was within the confines of the law. To this end, reference was made to the case of Gateway Insurance Company Limited vs Jamila Suleiman and Another [2018] eKLR, and Ahmed Mohammed Noor vs Abdi Aziz Osman [2019] eKLR.

74. The plaintiff avers that their title to the suit property has not been challenged in these proceedings through cogent and clear cut evidence. That for a period of over 30 years, the plaintiff held the believe and had the legitimate expectation that they held rights of proprietorship to the said property and in that regard, their title enjoys the principle of indefeasibility. To this end reference was made to the case of Elizabeth Wambui Githinji and 29 Others vs Kenya Urban Roads Authority and 4 Others [2019] eKLR where the court stated that;

“It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system.

Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation ..
.....”

75. Other cases cited are; Fanikiwa Limited vs Sirikwa Squatters Group and 17 Others (civil appeal 45 and 44 of 2017) (consolidated) [2022] KECA 1286 (KLR) (18 November 2022) (Judgment) and David Peterson Kiengo & 2 Others v Kariuki Thuo [2012] eKLR.

76. In challenging the claim of the 1st defendant the plaintiff claims that the allotment letter to the said parties (1st defendant) was issued on 5.1.1991 which was a Saturday, that the letter contains a clause “the government shall not accept any liability whatsoever in the event of prior commitment or otherwise”



a clause which was introduced by the Commissioner of Lands in 1994, and that the allotment letter contains LR No. 209/11552 for the suit property yet the said parcel did not exist at that time. Further it is contended that the plaintiff is the one who has a legitimate deed plan and that this was confirmed by one Wilfred Muchai. It is also argued that the 1st defendant did not adduce evidence of acceptance in regard to the letter of allotment and that there is no logical explanation as to why their land was registered 22 years later on 13.12.2013.

77. It is further submitted that the plaintiff is entitled to damages for trespass as against the 1st defendant. This is because the 1st defendant did not provide any justification for their reckless and illegal actions on the suit property. To this end, the case of *Kenya Power and Lighting Company Limited vs Ringera & 2 Others (Civil Appeal E247 & E248 of 2020)* (Consolidated) [2021] KECA 104 KLR (4 February 2022) (Judgment) and *Keiyian Group Ranch v Samwel Oruta & 9 Others* [2021] eKLR were proffered.
78. In conclusion the plaintiff prays that the prayers sought in the amended plaint be allowed.
79. The submissions of the 1st defendant are dated 3.3.2024. They frame the issues for determination as;
- i. Whether the plaintiff has established ownership of the property L.R. No. 209/11552.
* Surrender of L.R. No. 209/6525 by Kenya Railways Corporation.
 - ii. Whether the 1st defendant has established ownership of the property L.R. No. 209/11552.
 - iii. The claim by the 5th defendant.
 - iv. Conclusion.
80. It is argued that the letter of allotment for the plaintiff came before the surrender of parcel L.R. 209/6525, hence the allotment is illegal. On this point, reference was made to the case of *Njogu & Company Advocates vs National Bank of Kenya Limited* [2016] eKLR.
81. On the claim of the 5th defendant, it was submitted that by the time the alleged legal notice No. 169 of 2006 was given, the suit property had already been allocated to the 1st defendant, thus the suit property was not available for vesting to the 5th defendant. On this point, reference was made to the case of *Falcon Properties Limited V. David Songok Langat* [2019] eKLR.
82. The 1st defendant has reiterated that their title to the suit property can be traced to the allotment of 5.1.1991 and that all the records at the ministry of lands confirm that they are the owners of the suit property. That on the other hand the plaintiff has not demonstrated the root of their title. To this end, the 1st defendant has relied on the case of *David Peterson Kiengo & 2 Others vs Kariuki Thuo, Machakos HCCC No. 180 of 2011*, where the court held that: -
- “The registered Lands Act is based on the Torrens System. Under this system, indefeasibility of title is the basis for land registration”.
83. Other cases cited by the 1st defendant include; *Mike Maina Kamau v Attorney General* [2017] eKLR and *Punda Milia Co-Operative Society vs Savings & Loan (K) Limited HCCC No. 273 of 2008*.
84. The 1st defendant prays that plaintiff's suit be dismissed and their counter claim be allowed.
85. The submissions of the 2nd defendant are dated 1.4.2024 where they contend that it was incumbent upon each claimant to discharge the burden of proof to support their case. On this point, reference was made to a raft of authorities including; *Dr. Samson Gwer & 5 others V. Kenya Medical Research Institute & 3 Others* [2020] eKLR, *Rhesa Shipping Co SA V Edmunds* (1955) 1 WLR 948, *Agnes Nyambura Mbunga (suing as the Executrix of the Estate of the Late William Earl Nelson) v Lita*



Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR, Britestone Pte Ltd v Smith & Associates Far East Ltd (2007) 4 SLR 855 at 59, Caswell v Powel Duffryn Associated Collieries Ltd (1939) 3 AII ER 722 (HL) at 7333, Palace Investment Ltd vs Geoffrey Kariuki Mwenda & Another [2015] eKLR, IEBC versus Stephen Mutinda Mule & others [2014] eKLR, Dakianga Distributors Ltd V Kenya Seed Company Ltd [2015] eKLR, Raila Amolo Odinga & Others vs IEBC & Others [2017] eKLR, Mumbi M’Nabea vs David M. Wachira [2016] eKLR and Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi & Another [2014] eKLR.

86. It was submitted that on the basis of the aforementioned decision it was incumbent on the parties to establish the root of their titles by availing cogent evidence showing the process leading to their respective titles. And on this point reference was made to the case of Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 among other cases.

87. It was also argued that in order to understand the import, tenor and scope of what constituted an unalienated government land, it was crucial to adopt the dictum of the Supreme Court case of Torino Enterprises Limited v Attorney General (Petition 3 (E006) of 2022) KESC 79 (KLR) (22 September 2023 (Judgment) where the court held thus;

“What Article 62 of *the Constitution* does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the providence of “public tenure”. The retired constitution used the term “government” instead of “public” to define such lands.”

88. The 2nd defendant quoted at length the Supreme Court decision in Dina Management Limited vs County Government of Mombasa and 5 Others Petition Number 8 (E010) OF 2021 to detail the procedure for allocation of an unalienated government land. On surrender the 2nd defendant reiterated that the same takes effect upon registration of the surrender instrument and not otherwise. On this point reference was made to the case of Chief Land Registrar and Another vs Nathan Tirop & Others [2018] eKLR. It was urged that in the case of Fanikiwa Limited v Sirikwa Squatters Group & 20 others (Petition 32 (F036) & 35 (e038) of 2022 (consolidated)) [2023] KESC 58 (KLR) 16 June 2023) (Ruling) surrender was not defined under section 2 of RTA and that it was a concept of long lineage and wide usage in land law. In the said case, the court made reference to; The Black Dictionary (7th edition) at page 1458 where “surrender” is defined as follows:

“...The return of an estate to the person who has a reversion or remainder, so as to merge the estate into a larger estate.... A tenant’s relinquishment of possession before the lease has expired, allowing the landlord to take possession and treat the lease as terminated.”

89. On fraud it was submitted that the same must be pleaded, particularized and strictly proven as it was held in the case of Vijay Morjaria vs Nangigh Madhusingh Darbar & Another (Supra) amongst other cases. That in the case at hand, no evidence of fraud was proved against the 2nd defendant, hence the case against them should be dismissed.

90. The submissions of the 5th defendant are dated 13.5.2024. I have disregarded the said submissions on account of the fact that this party has submitted on facts yet they never tendered any evidence despite being present during the trial. As noted by the 2nd defendant, submissions cannot take the place of evidence: see Daniel Toroitich Arap Moi vs Mwangi Stephen Mureithi [2014] eKLR.



DETERMINATION

91. As analyzed in the background part of this judgment, the suit property parcel L.R. No. 209/ 11552 situated in upper hill area of Nairobi County is being claimed by three entities namely; The plaintiff who has a title, the 1st defendant who also has a title and the 5th defendant whose claim is derived from the mother title L.R. No. 209/6525. The claim of the plaintiff is set out in their amended plaint, that of the 1st defendant is set out in their Counterclaim, while the 5th defendant has no counterclaim and did not testify, but their suit ELC Case No. 302 OF 2015 has been stayed pending the determination of the current suit.

92. The common thread running throughout the trial is that the existence of multiple titles over the same parcel of land is untenable, thus the primary issue for determination before this Court is which of the competing claims is valid. In so determining, each claimant is required to prove their case in tandem with the provisions of Section 107-109 of the *Evidence Act*. In the case of Samson S. Maitai & another V. African Safari Club Limited & Another [2010] eKLR, the court had this to say in relation to proof;

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

93. And in the process of asserting the truth of their claim, the claimants are required to demonstrate the root of their title.

Such root must not be tainted with irregularities and illegalities. To this end, the Court of Appeal in the case of *Munyu Maina v Hiram Gathiba Maina, Civil Appeal number 239 of 2009*, held that:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register”. Emphasis added.

94. At this juncture, it is pertinent to cite the methods of acquisition of title to land in the Republic of Kenya. The provisions of Section 7 of the *Land Act* tabulate the methods as follows:

“Methods of acquisition of title to land;

- (a) Allocation;
- (b) Land adjudication process;
- (c) Compulsory Acquisition;
- (d) Prescription;
- (e) Settlement programs;
- (f) Transmissions;
- (g) Transfers;
- (h) Long term leases exceeding twenty-one years created out of private land; or



i. Any other manner prescribed in an Act of Parliament.”

95. The method of acquisition of land cited by the plaintiff and the 1st defendant is ALLOCATION. The protagonists therefore are required to demonstrate that their titles are not subject to challenge as set out under Section 26 of the *Land Registration Act*; meaning that their rights and interests in the suit property must not have been acquired illegally, unprocedurally or through corrupt schemes.

The claim of the plaintiff

96. The plaintiff claims that the president of the Republic of Kenya is the one who gifted the suit parcel to the president of United Arab Emirates for purposes of putting up a commercial building which would generate revenue to run an orphanage; This culminated in the issuance of an allotment letter to the plaintiff dated 22.1.1990 by the Commissioner of Lands. The said letter is to be found at page 37 of their bundle, of which the plaintiffs complied with the conditions set out therein and that they were ultimately issued with the title dated 26.2.1992 at page 66 of their bundle.

97. Was the allocation of the suit land to the plaintiff and the subsequent issuance of a title valid? In order to answer these questions, the court must determine the scope of the mandate of the President in allocation of public land, in addition to determining whether such land was available for allocation.

98. In the SCOK 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), as well as the case of Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir, Abdullahi Ibrahim Gure, Shaye Abdi Kusow & Sambul Ali Bulughho [2021] KEELC 3604 (KLR), the courts cited the case of African Line Transport Co. Ltd v The Hon. Attorney General, Mombasa, HCCC No. 276 of 2003 [2007] eKLR where the process of allocation of unalienated public land would entail;

“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”.

99. In addition, there must be confirmation that the land to be allocated is available and the potential beneficiary must make an application seeking to be allocated the land.

100. Although the plaintiff, through PW1 did not give an account of the aforementioned steps of land acquisition in respect of allocation of public land, their witness, PW2 did by and large confirm that the lengthy process ought to be followed as indicated in paragraph 5 of his witness statement. This was also reiterated by the 2nd defendant as reflected at paragraph 9 of the Land Registrar’s (DW2) witness statement.

101. The legal regime governing the allocation of public land by the president at the time in question was to be found under the repealed Government Lands Act. The provisions of Section 2 thereof stipulated that;

“The powers of the President under this paragraph are delegated to the Commissioner in the following cases only



- a. for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President”

102. While Section 3 of the aforementioned statute provided that;

“The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may —

- (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land”

Application

103. Was any application made for the allocation of the suit land?. I have keenly perused the documents availed by the plaintiffs. None of them predates the letter of allotment of 22.1.1990 save the Grant in the name of the General Manager East African Railways. None of the two witnesses for the plaintiff gave evidence as to how the request for land was initiated. The plaintiffs contend that the purpose of the allocation was to help orphans. Thus the application would have formed the basis for the president to set in motion the provisions of Section 2 & 3 of the repealed Government Lands Act.

104. In Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 Others [2019] eKLR, the court held that;

“The Commissioner of Lands also had no authority to alienate the suit land as Section 3 of the GLA, vests the power to alienate unalienated Government land in the President. The power to alienate is delegated to the Commissioner of Lands in limited circumstances for educational, charitable, sports and other purposes as set in the GLA. None of the exceptions set out therein empowered the 1st defendant to alienate the suit property to the 2nd defendant.”

105. Similarly, in absence of any evidence of the application detailing the purpose of the allocation, I find that the Commissioner of Lands had no authority to issue the allotment letter.

The Allotment letter

106. Did the land allocated to the plaintiff fall under the category of “unalienated Government land”?. By that term, “unalienated Government Land”, it means that the land was not committed. It has emerged that the suit land was part of the land contained in the mother title L.R.No. 209/6525, of which the title is to be found at page 54 of the plaintiffs bundle whereby the Grant No. 1.R 20605 issued on 1.1.1932 is in favour of the General Manager of The East African Railways And Harbours Administration. The last entry in the aforementioned Grant at page 56 of the said bundle indicates that the land was vested to East African Railways Corporation on 5.9.1969 through the East African Railways Corporation Act of 1967. The undertakings of the East African Railways Corporation were in turn transferred to the Kenya Railways Corporation through the *Kenya Railways Corporation Act* (Cap 397 laws of Kenya).

107. The interest in the Grant I.R No. 20605 for the mother title (parcel L.R. No 209/6525) was running from 1.1.1932 for 99 years. There is no other entry in respect of that mother title and no evidence has been adduced by any party to indicate that the mother title had been alienated to any entity as at 22.1.1990.



108. It follows that by the time the allotment letter was issued to the plaintiff on 22.1.1990, the mother title for parcel L.R. No. 209/ 6525 was intact and belonged to the Kenya Railways and was therefore not available for allocation. This position was confirmed by the Land Registrar (DW2) who during cross-examination stated that “ if the land has a title, then such land is not available for allocation” and reiterated by Dw3, another officer from the ministry of lands who stated that “ there is no provision for the Commissioner of Lands to allocate land that was titled”. Thus the allotment letter dated 22.1.1990 was unprocedurally given, hence unlawful as the land to be alienated did not fall in the category of unalienated Government land as ordained under section 3 of the Government lands Act.

The Surrender

109. An argument has been proffered that the land in question had been surrendered to the Government and was therefore available for allocation. However, like Murphy’s law where “anything that could go wrong will go wrong anyway”, nothing seems to be right about the surrender. To start with the surrender of the mother parcel, LR.209/6525 which is to be found at page 53 of plaintiffs bundle is dated 5.7.1991, allegedly registered on 2.8.1991, and it therefore came after the allotment of 22.1.1990. PW1 admits that the surrender should have come before the allotment. DW2, the Land Registrar stated that “any proper allocation is the one coming after the deed of surrender. As a consequence thereof and from this document, I would not say that the letter of allotment was legitimate”. As for DW3, he stated as follows on the status of the surrender; “I can confirm that the letter of allotment to the plaintiff was issued by the Commissioner of Lands and the only issue is that it was issued prior to the formal surrender by the Kenya Railways”. Both DW2 and DW3 aver that the effective date of surrender is the date of its registration which appears to be a stamp date of 2.8.1991. What then was the informal date of the surrender?. Perhaps 5.7.1991, the date of the document. Whichever date, it doesn’t salvage the allotment of 22.1.1990.
110. As for PW2, his explanation on the status of the surrender was that; “It was possible to have a letter of allotment issued to the plaintiff before the surrender because that was an intention”. This explanation lacks any logical account as it doesn’t state when the alleged intention was to crystallise!
111. Still on the surrender, there is no tangible evidence as to the purpose of the surrender. None of the witnesses has given evidence as to why a surrender was being made save PW2 who stated that “the purpose of the surrender was in exchange of freehold interest.” The surrender document itself reads as follows;

“The Kenya Railways Corporation HEREBY SURRENDER all its right title and interest therein to the Government of Kenya freed and discharged from all estate of the Surrenderor and to the intent that the term for which the same is now held shall merge and be extinguished in the freehold immediately expectant thereon.”

No evidence was proffered by any party as to the import of the above words in relation to the intention of the surrender.”

112. Another issue relating to the surrender touches on its registration. At paragraph 18 (iv) of his witness statement, DW2 avers that the surrender was registered on 2.8.1991 as I.R. No. 20605/2. Indeed the surrender bears a number 20605/2 dated 2.8.1991. This would mean that the Kenya Railways Title L.R./209/6525 was extinguished and the interest thereof was transmitted to the Government. The title held by the Kenya Railways was governed by the legal regime under the Registration of Titles Act. Ordinarily under this regime, any registrable transaction would be endorsed as an entry in a chronological order in the title document. The last entry in the surrendered mother title L.R.



209/6525 was on 5.9.1969 when the land was vested to the East African Railways Corporation! There is no evidence that the purported surrender was endorsed in the surrendered title or any other title document and given a description as an ENTRY NUMBER. Thus there is no basis upon which the Government could have embarked on allocating “its own land” to entities such as the plaintiff without a manifestation of the surrender in the title document.

113. This far, the logical conclusion to make is that the allocation of the suit land could not have been pegged on a future surrender. In addition, the surrender itself was irregular as it was not perfected through endorsement in the title.

Planning and Survey

114. Even assuming that somehow the Government did acquire the parcel allegedly surrendered by Kenya Railways, there is still no sanctity of the process that culminated in the issuance of the title of the suit land to the plaintiff. This is because what was surrendered was the big chunk of land LR. 209/6525 measuring 6.8 acres. It follows that any allocation of part of that land entailed re-planning and re-surveying. As at the time of the allocation of the suit land on 22.1.1990, there is no evidence that the aforementioned exercise had been undertaken. Rightly so because by then, the land was titled and had not been alienated in favour of the Government. Thus there is no evidence as to how the unsurveyed plot measuring 0.4 ha. was identified both on the ground and on paper as at 22.1.1990 within titled property.
115. It follows that the subsequent subdivision of the mother title which eventually birthed the suit land via an alleged deed plan 160806 was unprocedural.
116. It is not lost to this court that none of the parties have given a tangible account of how the mother title was subdivided. In *Davis Mwashao Jome v Damaris Karanja & another* [2021]eKLR, it was held as follows;

“If it is the case of the 1st defendant that the suit land was resurveyed, then it was the duty of the 1st defendant to avail to this court the survey plan for it, duly authenticated by the signature of the Director or a Government Surveyor authorized in writing by the Director”.

117. The maps availed by DW2 are not cross referenced in his witness statement and it is difficult to discern the sequence of the alleged subdivision. One of the maps reflect the subdivision of parcel 209/6525 into parcels 209/6525/1 and 6525/2, while the next one captures the suit parcel 209/11552 without showing whether the latter came from 6525/1 or 2.
118. It is worthy to note that the process of subdivision of land is a lengthy one, encompassing various stages including the generation of a subdivision scheme, placement of beacons and amendment of the Registry Index Maps. These processes are necessary in order to locate the placement of the resultant parcels both on the ground and on paper. Such is the evidence missing in respect of the suit parcel.

The missing records

119. In his witness statement, PW1 avers that all the original records relating to the suit property were in the custody of the President of United Arab Emirates, and when he passed on, the plaintiff was not able to get the said original documents, they were only left with copies. However, during cross examination, PW1 stated that “I was born on 14.4.1978. I was not present when the transaction occurred. ... I got the information from one Edward Munoko”.



120. However, the land registrar, (DW2) stated that plaintiff's advocates made inquiries on 7.6.2015 and 16.6.2015 regarding the suit file records. The police also made inquiries on the matter on 22.6.2015. Apparently the record file at the land registry was missing, hence the land registrar wrote to the plaintiff's advocate on 10.7.2015 detailing the process of reconstructing the file. During cross examination, DW2 stated that "the records we used to re-construct the file for plaintiff was what they gave us, that is what was available".
121. In the above scenario, it defeats logic as to how DW2, the land registrar could state at paragraph 6 of his statement that "Vide a letter dated 8.7.2015, the land registrar confirmed that the deed file was missing but search issued on 12.2.2015 was authentic showing the plaintiff as the registered proprietor". There is no plausible explanation from DW2 as to how authentication was done on the search even before the file was reconstructed, since the advise on how reconstruction was to be done was given on 10.7.2015!
122. Further, some crucial documents availed by DW2, in particular the surrender, the mother title for parcel 209/6525 and its deed plan, the 1.R. No. 20605 document from Land Titles registry as well as the 4 survey maps appear to be a cross breed of original and copies!. Since the plaintiff did not have original documents, and the record file from the ministry of lands was missing, it was then paramount for DW2 and DW3 to give an account of the actual source of their documents. Further the two witnesses ought to have explained as to what would be contained in a deed file since they are the officers from the ministry of lands which in turn is the custodian of the records in question. As the matter stands, it is not clear as to what records were available at the ministry of lands, and what was actually availed by the plaintiffs.

Utilization of the Suit property

123. PW1's testimony is that the purpose of allocation of the land was to put up buildings which would generate revenue to support a certain orphanage in Mombasa. The plaintiffs acquired the allotment letter in 1991, and the title in 1992. During cross examination, PW1 stated that "there are no buildings on that land". Thus until 2015, the plaintiffs did nothing to actualize the purpose of the allocation as was envisaged under Section 2 of the repealed Government Lands Act. This is a tell tale sign that the plaintiffs were not genuine on their alleged request for the land.

Good faith;

124. It has emerged that the 5th defendant was claiming the suit property in filing the case ELC 305 of 2015 on 17.4.2015 where they sued the current plaintiff as well as the 2nd defendant. PW1 even stated that they sued the 3rd defendant in the current matter (National Land Commission) because the commission had ruled in favour of the 5th defendant. Thus the plaintiff was well aware of the claim of the 5th defendant by the time this suit was filed on 6.7.2015 (two months after the suit of the 5th defendant was filed).
125. However, the current plaintiff did not sue the 5th defendant in their suit ELC 639 of 2015, but they went ahead and filed a contempt application "against a party (read 5th defendant) who is in breach of existing court orders". The officials of the 5th defendant were even convicted for the contempt.
126. The general rule of law emphasizes that parties have a responsibility to always act in utmost good faith (*uberimae fidei*) in judicial proceedings; In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR, the court had this to say on matters good faith albeit in a succession case;

"Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law



emphasizes utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

127. And in the case at hand, the plaintiff has certainly not acted in good faith in filing a suit without the claimant in case ELC 305 of 2015 where he had been sued. It is pertinent to note that the pleadings of the plaintiff were only amended on 13.10.2020 to include the 5th defendant.
128. In conclusion, I find that the claim of the plaintiff is unmerited as the acquisition of the suit land was unprocedural hence unlawful.

Claim for the 1st Defendant

129. The claim of the 1st defendant is based on the letter of allotment dated 5.1.1991. Just like the plaintiff, the 1st defendant has no evidence of an application for the land. DW1 simply states that there was an application in 1990.
130. However, unlike the plaintiff who at least could trace the history of the land from a surrender of that land by the Kenya Railways to the Government, the 1st defendants have no history at all of the suit land. DW1 did not give any account of where the suit parcel came from. It was only during submissions that the 1st defendant embarked on elaborating on the root of their title, stating that the land came to be out of a surrender of the mother title L.R. 209/6525. However, and as rightly submitted by the 2nd defendant, submissions do not constitute evidence, See Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi [2014] eKLR.
131. It is also noted that the allotment letter to the 1st defendant came on 5.1.1991 complete with an L.R. No. 209/11552 which would mean that the land had already been surveyed. There is no plausible explanation as to how the 1st defendant was getting a deed plan no. 162482 on 15.2.1992 in respect of the same parcel which already had a Land Registration Number a year earlier on or before 5.1.1991. Simply put, the 1st defendants have no evidence as to how parcel L.R. 209/11552 was birthed. It is clear beyond peradventure that the suit parcel L.R. 209/11552 did not exist as at 5.1.1991. Thus the only logical explanation is that the acquisition of their letter of allotment was based on fraudulent transactions, which are corrupt schemes.
132. It is also not lost to this court that the 1st defendant has not given an account of how they acquired a title on 13.12.2013, 22 years after they were allotted the land. In *Daudi Kiptugen v Commissioner of Lands Nairobi Lands & 4 Others* [2015] eKLR, it was stated that;

“The acquisition of title cannot be construed only in the end result, the process of acquisition is material..”
133. It follows that the waving of a title to the suit land by the 1st defendant does not in any way amount to possession of any rights of proprietorship, as whatever land they allegedly acquired did not exist. Thus the claim of the 1st defendant is outrightly illegal hence unlawful.

Claim of the 5th Defendant

134. It is trite law that whatever is pleaded must be proved in evidence, See *Galaxy Paints Company Ltd V Falcon Guards Ltd* [2000] eKLR. At paragraph 12 of their defence herein, the 5th defendant prayed



that their claim in ELC 302 of 2015 be allowed, where they alleged that parcel L.R. 209/6525 was illegally subdivided into various plots including the suit parcel L.R. 209/11552. I took over this matter on 7.12.2021 and I found that the case ELC 302 of 2015 had already been stayed via a consent order of 3.3.2020. The 5th defendant did not proffer any evidence in the instant suit. It would certainly have been far much better if all these claims were dealt with in one suit, but now that is water under the bridge. Under these circumstances, it is not tenable for this court to make a pronouncement in respect of the claim of the 5th defendant.

Rendition

135. In a case cited by the 2nd defendant Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR, Justice Munyao Sila stated that:

“A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all the processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a Title Deed or Certificate of Lease, then they have a right over the property.”

136. And so it came to be in the case at hand that both the plaintiff and the 1st defendant hold title deeds to the same parcel, L.R. 209/11552. The court has made a pronouncement that the allocation of the suit land to the plaintiff is tainted with unprocedural irregularities hence unlawful, while the allocation to the 1st defendant was out-rightly fraudulent, hence illegal and unlawful. Thus none of those claims are valid. It follows that the respective titles of the plaintiff and the 1st defendant should not be allowed to exist.

137. At this juncture I take cognizant of the fact that there are other claimants in respect of parcels resulting from subdivisions of Kenya Railways Land, a case in point being JR 11 of 2018 where judgment is due for delivery simultaneously with this matter, as well as case no. ELC 302 of 2015 which is pending. Having that in mind, I find that the logical conclusion to make is that the suit parcel belongs to the Kenya Railways or its lawful beneficiaries.

138. In light of the foregoing analysis, I proceed to give orders as follows;

1. The plaintiffs claim is hereby dismissed.
2. The Counterclaim of the 1st defendant is hereby dismissed.
3. The unlawful titles issued to the plaintiff and the 1st defendant in respect of the suit parcel L.R. 209/11552 are hereby cancelled.
4. The suit land parcel L.R. 209/11552 shall revert to the Kenya Railways Corporation or to its lawful beneficiaries.
5. The consent order given on 3.3.2020 staying the suit 302/2015 is hereby discharged. The said matter is to proceed.
6. As to costs, I find that every party in this suit save the 5th defendant appears to have been part and parcel of the unlawful schemes in which the Kenya Railways land was unprocedurally and



illegally alienated. I have also taken into account that the suit ELC 302 of 2015 is pending. In the circumstances, I direct that each party shall bear their own costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kithinji for Plaintiffs

Obuya for 1st Defendant

Tharangu holding brief for Kiogo for 5th Defendant

A.Kamau for the 2nd Defendant

Court assistant: Joan

