



Kimondo & 2 others (Suing for and on behalf of the Bondeni Maili Saba Jua Kali Association) v Wambui & 3 others (Environment & Land Case 1235 of 2015) [2023] KEELC 757 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELC 757 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1235 OF 2015**

**JA MOGENI, J
FEBRUARY 9, 2023**

BETWEEN

**NICHOLAS WAHOME KIMONDO 1ST PLAINTIFF
PETER MARERA GIKONYO 2ND PLAINTIFF
JANE WACHUKA MBUGUA 3RD PLAINTIFF
SUING FOR AND ON BEHALF OF THE BONDENI MAILI SABA JUA KALI
ASSOCIATION**

AND

**ABIGAELE WAMBUI 1ST DEFENDANT
PAULINE WAMUYU 2ND DEFENDANT
MARGARET WANJUKU MAGU 3RD DEFENDANT
NJIRU HOUSING DEVELOPMENT LIMITED 4TH DEFENDANT**

JUDGMENT

1. By a Plaint dated November 24, 2015 the plaintiff herein sought for judgment against the defendants jointly and severally for the following orders: -
 - a. A declaration that the suit land lawfully belongs to the Bondeni Maili Saba Jua Kali Association.
 - b. A permanent injunction to prohibit the defendants and or their agents or those claiming through or under them from trespassing upon or taking over or transferring or in any way alienating the property known as plot no L R 10905-Embakasi or any portion thereof.



- c. An order of eviction in the event of the defendants or any of their agents or those claiming through or under them having settled on the suit land in the meantime
 - d. Costs
2. It is pleaded in the Plaint that the plaintiff is the registered officials of Bondeni Maili Saba Jua Kali Association and who are the lawful owners of the plot no L R 10905-Embakasi which was allocated to it on November 15, 1998 by Nairobi City Council it measures 62.3 hectares.
 3. According to the plaintiff, all the requisite payments for the plot as per the allotment letter were paid and this include the stand premium. That despite this the defendants have trespassed on to the suit land laying claim to the suit.
 4. The plaintiff plead that they filed a suit CMCC Civil Case Number 2984 of 2008 where the court held that it had no jurisdiction to hear and determine the case due to the monetary value of the property. The plaintiff then filed the instant suit because the previous suit was not heard on merit.
 5. The plaintiff filed together with the Plaint a witness statement and List of Documents both dated April 28, 2021. The list of documents contained copies of six (documents) in support of the plaintiff's claim.
 6. The plaintiff was represented by Nicholas Wahome Kimondo who is one of the registered officials of Bondeni Maili Saba Jua Kali Association. The case proceeded for trial on May 16, 22 and the plaintiff was represented by Mr Ingutia advocate.
 7. The plaintiff relied on the witness statement dated November 24, 2015 which the court adopted as part of the evidence. In his evidence he informed the court that the suit property plot no LR 10905-Embakasi belonged to Bondeni Maili Saba Jua Kali Association. He further pointed out that the defendant have trespassed onto the suit land laying claim on the whole of the land by erecting sign boards and this prompted the filing of the instant suit.
 8. He produced in court copies of 1) Certificate of registration dated August 23, 199 2) letter of allotment dated October 14, 199 3) letter from the City Council of Nairobi dated November 15, 1998, 4) agreement dated July 25, 2002, 5) letter of confirmation from the district commissioner dated August 7, 2008 and 6) bundle of receipts filed vide the plaintiffs List of Documents dated April 28, 2021 and which were marked produced as 'PW Exh. 1 to 5'.
 9. Since the suit was withdrawn against the 1st, 2nd and 3rd defendants the suit was against the 4th defendant as the only defendant. Through the defence of Charles J Mwaura dated November 12, 2008 the defendant denied the plaintiff's claim. The defendant had raised a preliminary objection dated September 11, 2013 alleging that the instant suit was *res judicata* having been heard and determined by the lower court in lower court CMCC 2984 of 2008.
 10. The preliminary objection was heard and determined. In his defence, he alleges that the plaintiff is the trespasser to the suit property. That the defendant is the bona fide exclusive and sole owner of grant number 43481, LR 43/3 (original 10905) having been registered on December 29, 1998 as the sole proprietor of the property.
 11. The defendant also averred that several other claimants (though not parties to the instant suit) have attempted to lay claim to the suit property but have been defeated through suits filed in court and orders issued against the trespassers. He mentioned six cases in reference.
 12. The suit was set down for hearing on May 16, 2022 and both the plaintiff and the defendant testified.



Plaintiff's case

13. PW1- Nicholas Wahome Kimondo testified that the plaintiff testified that the plaintiff was owner of land parcel number LR 10905. He relied on his witness statement dated November 24, 2015. He produced the documents in his List and Bundle of documents as plaintiff's exhibits 1 to 6. He was appearing on behalf of members of Bondeni Maili Saba Jua Kali Association. He also stated that there was a previous suit which was however dismissed and not heard on merit.
14. Upon cross-examination, by counsel of the defendant he stated he was authorized by Bondeni Maili Saba Jua Kali Association but that he had not filed any documents showing the authorization from members in the bundle of documents that he had brought to court. He further stated that the plaintiff was claiming 62.3 hectares of the suit property.
15. It was his testimony that the two allotment letters the one on page 2 was the one for 1998 and the one on page 3 is the one for 1999. Both letters required that the plaintiff pays certain fees and it was his testimony that they paid in 2002, 2008, 2014. That they paid rates and stand premium, which receipts he attached and produced at page 9 of the plaintiff's bundle.
16. It was his testimony that he was not told why the plaintiff association was allotted the land vide two letters but it was his contention that the plaintiff was allotted the suit property anyway. He further stated that he was given a letter with no signature and he did not ask why this was done.
17. He testified that the letter for 1999 was from the department of lands and it is also not signed. However, he testified that he had not made any payments to the Ministry of Lands but he had made payments to the City Council of Nairobi because they gave the plaintiff land.
18. PW1 contended that the allotment letter of 1998 which is at page 3 of the bundle contained the provision that the plaintiff was to pay the amounts indicated in the allotment letter within 30 days but the plaintiff never paid within the specified time.
19. It was his testimony that he had seen the defence by the defendant but he had not seen any other documentation that stated that the land was owned by the defendants.
20. In re-examination, the plaintiff stated that he was authorized by the members of Bondeni Maili Saba Jua Kali to represent them and he had presented a copy of the original registration certificate of the association of the Bondeni Maili Saba Jua Kali because the original copy was destroyed by water.
21. He also testified that he paid the stand premium and rates but he only had copies of the receipts and not the original receipts. He stated that he never paid the Ministry of Lands because he never got directions from the Ministry where he was to pay the requisite charges. The plaintiff at this point closed their case.

Defence case

22. DW 1- Charles Mwaura, Director Njiru Housing Development Limited, the 4th defendant stated that he wished to rely on his witness statement filed in court on July 26, 2018 and his bundle of documents dated November 4, 2018 which are DW1- Exhibits 1-31.
23. It was his testimony that at page 10 there was a copy of the title deed of the suit parcel of land grant 43481 and the size is 59.8 hectares. He further testified that the suit property was acquired on December 14, 1998 and the title has never been cancelled.
24. He testified that the plaintiff has no counter-claim to revoke the grant nor a counter-claim to the suit property at all. It was his testimony that the land belongs to the defendant



25. In cross-examination, he reiterated that he acquired the suit property in 1998 and that at page 29 of the defendant's bundle and at paragraph 7 it showed that he was involved in the purchase of the suit property. He stated that they had an agreement for sale and the suit property was transferred to the name of the defendant at a cost of Ksh 25,000,000 including stamp duty.
26. He further stated that he had no authority from the company to testify on behalf of the company, neither a copy of the sale agreement, nor a copy of the stamp duty receipt. He also stated that he did not have any receipts to show that they paid rates and land rent. It was his testimony that he did not have a deed plan attached to his documents which he produced in court.
27. He testified that he was aware that a grant without a title was not authentic. He also stated that he did not have the original copy of the grant either. He was directed to bring the original title for the court to verify the copy he had with the original. At the time of writing this judgment the defendant had not produced the original title to authenticate his claim over the suit property.
28. It was his testimony that the land in question is not in possession of the plaintiff but that the defendant had fenced it off. He testified that he has never seen any intervention by any government agency regarding the land since they acquired it in 1998.
29. In re-examination he stated that he understands the nature of the land transaction, that the land was charged by Standard Chartered Bank and that the defendant bought it in the open market.
30. It was his testimony that DW1 did a search and there is certification at page 9 of his bundle of documents. He stated that the plaintiff has not shown a map and deed plan. Further that the plaintiff's claim was about owner of land and not occupation but that he had shown that the defendant is the owner of the land. With this the defendant closed his case.
31. After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiffs filed its submissions dated September 20, 2022 while the defendant filed its submissions, dated February 9, 2022.
32. In their submissions, the plaintiffs submitted that they are the lawful owners of the suit property and that while they were working towards processing title in 2008 the defendant trespassed on their property. The plaintiffs have relied on the case of *Eunice Wairimu Kura vs Norman Mutuota & 2 Others* [2020] eKLR. The plaintiffs reiterated that a lawful allotment vests in the allottee a beneficial interest that cannot be defeated by a subsequent allotment even if there is a grant and or title issued.

The defendant submitted that they purchased 59.08 hectares from Gursharan Singh Brar in the year 1998 after conducting an official search and they were issued with a title under cap 281 (repealed). That the issuance of the grant to the defendant is *prima facie* proof of ownership of the suit property as per section 23(1) of the RTA (repealed) which is in tandem with section 26 of the current [Land Registration Act](#).

It is the defendant's submission that since there is no averment of fraud or misrepresentation then the title of the defendant is impeachable.

Issues for determination

33. From the pleadings and evidence on record the issues that arise for determination are:-
 - i. Whether the suit property was lawfully allotted to the plaintiff
 - ii. Whether the defendant has trespassed upon the suit property.



- iii. Whether the plaintiff is entitled to the reliefs sought.

Analysis and determination

34. The plaintiff's claim is that the defendant had without the plaintiff's consent and without legal justification or reason, entered upon the suit premises and forcefully taken possession of the same. He contends that his efforts and demands to have them cease trespassing on the suit land had been unsuccessful hence his decision to enlist the court's assistance.
35. When this matter came up for hearing, whereas the plaintiff claimed to be a member of the Bondeni Maili Saba Jua Kali Association, curiously it was he alone that testified and he did not call any independent or additional evidence from his members. It may very well be that his evidence was sufficient but unfortunately there were gaps that may have been filled in by another member if at all the Association was in existence and it had members as he claimed.
36. He produced a bundle of documents totaling 6 in number and submitted that the same were intended to show that the suit property belonged to the association and not to the Defendant.
37. He also submitted that the defendant trespassed on the suit property belonging to the plaintiff and he now wished that judgment be entered against the defendant.
38. In their defence the defendant denied the plaintiff's claim to ownership and averred that the suit land belonged to the defendant who alleges to have bought it in 1998. He therefore averred that the plaintiff is the one who is a trespasser.
39. He also admits in paragraph 11 of the Defence that the defendant has owned the property since purchasing it and the plaintiff and others (not before the court) have attempted to lay claim on the land but the attempts have been defeated through court orders issued following filing of suits in court since 2002.
40. From the documents submitted in evidence herein, it is clear that the plaintiff still has no title to the suit premises as would confer upon him the rights and privileges of a registered proprietor under section 27 and 28 of the Registered Land Act. Further all the documents produced by the plaintiff are photocopies this include two letters of allotment dated October 14, 1999 and November 15, 1998, receipts for payment for 2002, 2008 and 2018, and a copy of a letter from the Provincial Administration dated August 7, 2008.
41. The makers thereof were not called to produce them the said documents. Although they were said by the plaintiff to be intended to prove his ownership of the suit premises, I am afraid they do not meet the legal standards required in that regard. Injunctive orders in the nature of which is sought by the plaintiff cannot issue to a person who does not have a legal or equitable interest in the property in question.
42. At the same time, though the plaintiff did not attribute any fraud on the part of the defendant, a scrutiny of the documents relied upon by the defendant show that he did not purchase the suit property at an open auction market as he alleges. There are no documents to show how the defendant purchased the suit property as he claims to have done so after an official search.
43. No copy of the official search is attached, nor the sale agreement to facilitate the purchase from one Gursharan Singh Brar in 1998 by the defendant. There is no instrument of transfer of the property and registration thereof by the Registrar of Titles. The court in the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR stated that there is need to have clearly demonstrated processes and



procedure followed leading to one being issued with certificate of lease for a suit property and that it was not simply enough to wave a title document in front of the court.

44. Therefore, even on his part the defendant has not proven the root of its title. In the case of *Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others* [2019] eKLR the Court of Appeal stated as follows:

61. This court has often times stated that when a certificate of title is under challenge, the root of title must be proved. The lawfulness of the acquisition of title must be demonstrated to oust the provisions of article 40 (6) of the Constitution. In the instant matter, the appellant never led convincing evidence to establish the root of his title. We thus find that the trial court did not err in finding that the certificate of title held by the appellant was null and void.....”

45. It is trite law that whoever asserts the existence of a legal right or liability is encumbered with the burden of proving the existence of that right or liability asserted.

Section 107 of the *Evidence Act* (cap 80 Laws of Kenya) succinctly states:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

46. And section 108 of *Evidence Act* (cap 80 Laws of Kenya) further states thus:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

47. In the case of *Hubert L Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, Munyao J held as follows;

‘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 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. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

48. The evidence tabled by the defendant although no supporting documents were presented was that he had bought the suit parcel of land from the one Gursharan Singh Brar in 1998. As already stated there is no sale agreement presented that support the allegation that the suit property was bought either from Mr Gursharan Singh Brar or the open market as he alleges and for the consideration stated.

49. On the other hand, the plaintiff's asserted ownership of the suit property is founded upon allotment letters issued to the plaintiff dated November 15, 1998 and August 23, 1999. The defendant has attacked the letters of allotment held by the plaintiff on the grounds that the one issued in 1999 is not signed whereas the one issued in 1998 was issued before the plaintiff came into existence since the plaintiff association was registered in August 1999. Whereas the allotment letter was issued on



November 15, 1998. Further the plaintiff has not tabled evidence to show that the conditions provided in the any of the allotment letters were complied with.

50. Once the defendant attacked the allotment letters, the question of the process of acquisition of the allotment letters came into play. The question of acquisition behoves the court to trace the legal prescriptions for the issuance of an allotment letter and to adjudge the plaintiff's acquisition from the light of the law.
51. The court in the case of *Mako Abdi Dolal v Ali Duane & 2 others* [2019] eKLR noted that prior to the promulgation of the 2010 *Constitution* and the 2012 amendments to the body of Land Laws in Kenya, disposition of government land was governed by the Government Lands Act (Repealed). Section 4 of the Act provided as follows:

“All conveyances, leases and licenses of or for the occupation of government lands, and all proceedings, notices and documents neither this Act, made, taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act.”

52. Power to dispose of public land was vested in two entities: The president and the commissioner of lands, under sections 3 and 9 respectively. The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the commissioner of lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See *Harison Mwangi Nyota v Naivasha Municipal Council & 20 others* [2019] eKLR where the court stated as follows:

“...The question that the plaintiff seemed to raise is what role the municipal council of Naivasha had in the issuance of allotment letters to the defendants in 1992. According to DW1, an employee of the 1st defendant, the local authority (1st defendant) has to recommend that the land is available for allocation before an allotment letter can issue. DW13 also told the court that the Council oversees all developments in its jurisdiction and allocates land on advisory basis for the commissioner. It seems that even if the 1st defendant issued the letters dated December 1, 1992, it was mere advisory to the commissioner of lands. The allotment of the land had to be ratified by the commissioner for lands. It is obvious even from the communication between the municipal council and the Office of the commissioner of lands that the council played an important role in identifying what land was available for purposes of alienation.”

53. The second step would be for the part development plan to be drawn up and approved by the commissioner of lands. See *Nelson Kazungu Chai & 9 Others vs Pwani University College* (2014) eKLR the court stated that:

“It is trite law that under the repealed Government Lands Act, a part development plan must be drawn and approved by the commissioner of lands or the Minister of Lands before any unalienated government land could be allocated. After a part development plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee.”



54. The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under section 11 of the Government Lands Act (repealed). The matters to be determined include the upset price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.
55. The fourth step would be for the gazettment of the plots to be sold, at least four weeks prior to the sale of the plots by auction under section 13 of the Government Lands Act (repealed). The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.
56. The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the Government Lands Act (Repealed).
57. The sixth step would be for the issuance of an allotment letter to the allottee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* 182/1992 (Nyeri); and in *Dr Joseph N K Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others* C A 60/1997 where the Court of Appeal held as follows:

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

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

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



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

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

60. And again, in *Nelson Kazungu Chai & 9 Others vs Pwani University College* (*supra*) where the court said:

“Worth noting as well is that no Part Development Plan was produced to back the appellants’ claim that due process had been followed as alleged.”

61. The seventh step, which comes after the allottee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the director of surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease. *Nelson Kazungu Chai & 9 Others vs Pwani University College* (*supra*) eKLR the court held as follows:

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

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

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

63. In the present case, the court confirms that the plaintiff did indeed file two letters of allotment dated November 15, 1998 and October 14, 1999. The earlier from Nairobi City Council and the latter from department of Land which was not signed. The second allotment letter had conditions to be fulfilled before the allotment letter could confer interest in land. These conditions were to be fulfilled within 30 days of offer from the date of the letter which was November 15, 1998.

64. The plaintiff has however provided an affidavit sworn which has not averred to having fulfilled the conditions of offer. Further, the filed allotment letter(s) does indeed have a part development plan attached, satisfying the second condition.



65. On the third the plaintiff was supposed to pay for the stand premium and rent. There is however a hitch because the first letter of allotment required payment of stand premium of Kesh 172,000 and rent from June 30, 98 to December 31, 1998 of Kesh 22,400 totaling Kesh 194,400. The second letter of allotment dated October 14, 199 required payment of stand premium of Kesh 93,000 and rent from 1/7/1999 of Kesh 3,200, conveyancing fees of Kesh 1,250, registration fees of Kesh 250, stamp duty of Kesh 1,2000 and survey fees of Kesh 2,490 all totaling Kesh 101,390.
66. The plaintiff has not provided evidence to show that he did comply with the conditions set out in the allotment letter(s), specifically that he did pay the stand premium and ground rent. Now, both the allotment letter referred to, required the payment of a stand premium and other payments and the offer was only open up to 30 days. This means when the plaintiff failed to pay after December 15, 1998 and December 14, 199 respectively, the offer lapsed. See *Rukaya Ali Mohamed vs David Gikonyo Nambachia* & another Kisumu HCCA 9/2004 where Warsame J (as he then was) held that:
- “...once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest”.
67. In the present case, upon lapse of the offer contained in the allotment letter(s), the land was free to be allotted to someone else.
68. On the other hand, the defendant did not place any evidence before the court to show that the land was allotted to him. It his testimony that he purchased the land. He however did not present any sale agreement nor proof of purchase of the suit property.
69. The defendant also argues that the plaintiff has not pleaded fraud on the part to the defendant or misrepresentation making the title to the defendant impeachable. He referred to section 26 of the [Land Registration Act](#) that states that presentation of title is held as conclusive proof of ownership.
70. I think I have said enough to demonstrate that the plaintiff has not made up a case for being granted the orders sought. At the same time, I note that the title of the defendant is also doubtful. Therefore, the long and short of the entire analysis is the both parties have failed to prove ownership to the disputed suit property and I am not persuaded to exercise the court’s discretion to grant any order in favour of either party. For reasons given above I find no merit in the plaintiff’s suit and only state that he has failed to prove his case on a balance of probabilities and so the suit is dismissed. I make no orders in favour of or against the defendant. Therefore, since the plaintiff has failed to prove his case on the balance of probabilities, his suit fails and the same is hereby dismissed.
71. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 9TH DAY OF FEBRUARY, 2023.

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MOGENI J

JUDGE

Judgment read in virtual court in the presence of:

Mr Musdaf appearing together with Mr Peter Mureithi for 2nd plaintiff

Mr A Ingutya for plaintiffs



Mr Onyango for Defendants (Njiru Housing Development)

Ms Caroline Sagina: Court assistant

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MOGENI J

JUDGE

