



**Ethics & Anti-Corruption Commission v Sitienei & another (Environment & Land Case 53B of 2021) [2023] KEELC 16215 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16215 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 53B OF 2021**

**A OMBWAYO, J**

**MARCH 9, 2023**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**ALEXANDER KIPNGETICH SITIENEI & ANOTHER ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Ethics and Anti-Corruption Commission (hereinafter referred to as the Plaintiff) commenced this suit vide a plaint dated 17<sup>th</sup> June, 2021 and stated that the parcel of land known as Nakuru Municipality Block 8/30 is part of alienated government land vested in the Managing Director of Pyrethrum Processing Company of Kenya (PPCK). The plaintiff averred that the suit property was not available for alienation to Alexander Kipngetich Sitienei (hereinafter referred to as the 1<sup>st</sup> Defendant) or any other person. It is alleged that the alienation of the suit land was fraudulent, illegal, and null and void. The plaintiff therefore sought for judgment to be entered against the Defendants as follows:
  - a. A declaration that the Certificate of Lease held and/or in favour of 1<sup>st</sup> Defendant in respect of Nakuru Municipality Block 8/30 was irregularly and fraudulently acquired, consequently null and void, ineffectual to confer any right, interest or title upon the 1<sup>st</sup> Defendant.
  - b. An order for rectification of the land register by cancellation of the lease, certificate of lease and all entries on the Land Register in respect to Land Parcel Nakuru Municipality Block 8/30, held or made in favour of the 1st Defendant so as to restore the suit property to the PPCK.
  - c. An order of permanent injunction against the 1st Defendant his agents, servants or assigns restraining them from leasing, transferring, charging, taking possession or in any other manner howsoever from dealing with the suit property Nakuru Municipality Block 8/30 her than by transfer, delivery up or surrender of the same to PPCK.



- d. General damages for fraud.
  - e. Costs and incidental to the suit.
  - f. Any other or further relief the court may deem fit and just to grant.
2. Wilson Gachanja (hereinafter referred as the 2<sup>nd</sup> Defendant) entered appearance and filed his statement of defence wherein he stated that the suit land was government land available for allocation. The 2<sup>nd</sup> Defendant denied the allegations of fraud on his part and as enumerated in the particulars of fraud in the plaint. It was the 2<sup>nd</sup> Defendant's case that the Plaintiff's is not entitled to the orders sought and prayed that the suit be dismissed with costs. The 1<sup>st</sup> Defendant herein entered appearance and also filed his statement of defence dated 2<sup>nd</sup> September, 2021 where he denied the Plaintiff's allegations and averred that the parcel of land was allocated to him, allotment letter issued and the certificate of lease finally issued. He pays rates for the suit property to the county government of Nakuru and rent to the Government of Kenya. The 1<sup>st</sup> Defendant prayed that the suit dismissed with costs.

### **Plaintiff's Evidence**

3. Sylvester Musera Osodo testified as PW1. His statement dated 8/11/2018 was adopted as his evidence in chief. PW1 stated that he is a lands officer at Wundanyi and deals with land administration matters. He explained the process of allocation of land by the government. He testified that the process starts with the identification of the government land after which an application for allocation is made to the Commissioner of Lands. Upon establishment that the land is available for allocation, he would then exercise his discretion and dictate the amount of money to be paid.
4. He stated that once valuation is done, the Commissioner would then authorize the letter of allotment with special conditions where the allottee would accept the offer by paying for the land within 30 days. He further testified that upon payment of the money, a letter is written to the Director of Surveys to forward an RIM and a lease document is prepared and forwarded to the Land Registrar in the respective District. He stated that the Certificate of Lease is prepared by the Registrar of Lands. He further stated that the suit land was allocated to Alexander Sitienei to which he produced a bundle of documents 1 to 14 marked as "PEX1".
5. He testified that Kshs. 127,000 was received on 11/12/1997 and that the land was not supposed to be allocated because of government interests. He added that there is a claim by the Pyrethrum Board of Kenya.
6. On cross examination, he stated that he is an employee of the National Land Commission (NLC) which is the custodian of all public land and confirmed that there is no complaint by NLC. The witness was shown the allotment letter where he confirmed that the said land measured 0.525Ha and the money to be paid was 127,190. He further confirmed that he signed the letter and that he has never revoked the said allotment letter. He added that there has been no amendment since 13/5/1981 and that the parcel had been curved that time. He admitted to having a copy of the approval letter dated 28/4/1971 which shows unsurveyed plot for the pyrethrum Board. The witness confirmed that the said letter gave rise to the survey and that the acreage for survey map is for 0.724Ha. He further confirmed that there was no letter requesting for the RIM and that there is also no evidence of title.
7. He confirmed that he has been the head of Survey since the year 2012 and that before a certificate is issued an RIM should be drawn. He added that the Map is generated by the Survey of Kenya and for a title to be issued, the RIM should be signed and sealed. He also confirmed that the RIM cannot be generated in Nakuru since the original one is in Nairobi.



8. On re-examination, he stated that the letter was addressed to the District Land Registrar Nakuru and not Survey of Kenya.
9. Wilson Kibichi PW2 adopted his statement dated 2/8/2018 as evidence in chief where he stated that he is a principal cartographer working with the Ministry of Works and Physical Planning. He testified that he deals with maintenance of survey records. He produced a survey plan F-R No. 142/148 which he stated that it was to be created to NKR/Municipality Block 30. He went on to testify that the acreage was 0.724 and that the parcel of land is an RIM which land was cited on 13/5/1981.
10. Wesley Kiprono testified as PW3, that he works with Pyrethrum Board of Kenya as an administrative assistant. He testified that Nakuru/Municipality Block 8/30 belongs to his employer the PPCK.
11. On cross examination, he confirmed that the company has been sued several times. He further confirmed that he has never seen a lease or title deed of the company. He added that a Certificate of Lease had been issued on 20/5/1998 but there is no structure on the land. He confirmed that the title belonged to the board and that he does not impeach the 1<sup>st</sup> Defendant's title deed. He added that the Chief Land Registrar confirmed that the 1<sup>st</sup> Defendant is the owner. On re-examination he stated that he had seen the Certificate dated 26/6/2012 which was not copied and addressed to PPCK.
12. Caleb Wanjala Sunguti testified as PW4 where he also adopted his statement filed on 23/6/2021 as evidence in chief. He stated that he is a Land Registrar currently based in Nairobi. He produced a letter dated 28/5/1998 which was marked as PMFI2. He further produced a lease agreement dated 23/1/1998 PEX1 (8) in favour of the 1<sup>st</sup> Defendant. He stated that the lease was issued on behalf of the Commissioner of Lands signed by the 2<sup>nd</sup> Defendant. He further stated that the lease was registered on 29/5/1998 for a term of 99 years.
13. On cross examination by Kipkoech, Counsel for the 1<sup>st</sup> Defendant, he stated that from the letter dated 18/5/2021, Mr. Nyantika was his predecessor and that the letter confirmed that the 1<sup>st</sup> Defendant was the owner of the suit land. He was shown letter dated 26/6/2012 where he confirmed that the same was authored by Gicheha acting as the Chief Land Registrar. He further confirmed that the parcel of land belonged to the 1<sup>st</sup> Defendant. On further cross examination by Mr. Mburu Counsel for the 2<sup>nd</sup> Defendant, he confirmed that the lease had been signed by the Land Registrar. He added that the office of the Commissioner of Lands was a department at the Ministry of Lands and that Mr. Gachanja was not acting in his personal capacity but as the Commissioner of Lands.
14. On re-examination the witness confirmed that the Land Registrar usually signs the lease after the Commissioner of Land has signed. He added that the Commissioner of Lands can be sued in his personal capacity. Boniface Kariuki Waweru testified as PW5. He testified that he is a registered valuer practicing with Kamau & Company Valuers. He further stated that he had worked as a valuer for the Plaintiff's from 2015-2021. He stated that he did a valuation of the suit property which was Kshs. 30,000,000. He further stated that he inspected the property on 2/9/2018. He testified that at the time of inspection they ignored a temporary shade that was present. He added that he got the acreage from the copy of the certificate of official search and confirmed that the owner of the land was the 1<sup>st</sup> Defendant.
15. On cross examination he admitted not to have annexed his practicing certificate for the year 2018. He further admitted that the property could only be valued with proper legal documentation. Upon re-examination he stated that he was licensed to practice then for the Plaintiff and that the basic requirement for valuation is a search and a map.



16. Gordon Adeka Ochieng testified as PW6 where his statement dated 23/6/2021 was adopted as his evidence in chief. He testified that he has worked at the Ministry of Lands, Public Works and Urban Development since 1980. He testified that there were two allotment letters issued to the 1<sup>st</sup> Defendant in respect to Eldoret Municipality/Block 8/30. He further testified that he was not able to tell how the plot in Eldoret led to a lease in respect to a plot in Nakuru. It was his testimony that the allotment letter indicated certain substitutions in the two letters of allocation. He further testified that the file folio was the same size as well as the payment receipt. He added that he was unable to retrieve any record for Nakuru property as he only had the Eldoret record. He testified that there was similarity in the documents hence there was a possibility of manipulation of records.
17. On cross examination by Mr. Kipkoech, he confirmed that a Certificate of Lease had been issued in 1998 while the suit was filed in 2021. He further confirmed that he never received any complaint from any person. He admitted that they had not commenced any investigations at the lands office but confirmed that the Plaintiff did. He added that he was not aware of any investigations and confirmed that the land belonged to the 1<sup>st</sup> Defendant. He confirmed that the 1<sup>st</sup> Defendant had nothing to do with creation of files at the lands Ministry. He also confirmed that Gachanja was a Land Registrar who has since retired. On further cross-examination by Mr. Mburu, the witness confirmed that he did not know who manipulated the records and that the allotment letter had been issued by the Ministry. He confirmed that the 2<sup>nd</sup> Defendant was a Commissioner of Lands from 1976 to 1998 and that NLC is the current custodian of all the documents. Upon re- examination he stated that he was not aware whether NLC or the Chief Land Registrar was investigating the matter. He stated that they have an invitation of double allocation.
18. Ephrahim Shombe testified as PW7, his statement dated 13/11/2018 was adopted as his evidence in chief. He testified that he is an investigating officer at EACC and that the suit land belonged to the Pyrethrum Processing Company of Kenya formerly Pyrethrum Board of Kenya. He testified that the letter dated 28/4/1977 was from the Director of Survey to the Provincial Surveyor Nakuru inviting him to survey the un-surveyed land for the Board. It was his testimony that a beacon certificate was to be obtained for the Pyrethrum marketing Board. He further testified that a survey was conducted on 17/11/1977 and they generated a survey map F.R 142/148 for L.R No. 451/2013 and a survey beacon certificate was generated as instructed by the Director of Survey on 21/11/1977. He testified that after the survey the RIM for Block 8 had been amended in 1981. He further testified that there was no old parcel number as in the F.R it was recorded as number L.R 031/2013 while the new parcel number was Nakuru /Municipality Block 8/30. He testified that the land belonged to Pyrethrum Board and that plot numbers 31 to 42 have a different F.R number.
19. He testified that they found an allotment letter of Block 8/30 Nakuru Municipality dated 31/5/1996 to the 1<sup>st</sup> Defendant but that the said letter did not have an attached PDP. He further testified that the 1<sup>st</sup> Defendant was to pay Kshs. 127, 190 which he did on 11/12/1997. He testified that they were able to establish that the 1<sup>st</sup> Defendant was an aide de camp of the former late President Daniel Arap Moi. He testified that the 1<sup>st</sup> Defendant had given instructions that the titles be prepared in his name. He testified that the allotment letter issued to him is the same as that of Eldoret and a lease document prepared on 23/1/1998. He further testified that the land was first registered in the name of James Mbugua Migui and later found that the registered proprietor was the 1<sup>st</sup> Defendant. He also testified that the same parcel of land was also being claimed by Julius Karanja Ngumo who also had an allotment letter dated 18/1/1996 Reference Number 30884/XLIV for Block 8/30 Nkr Municipality. He added that the lease was for 99 years from 1/2/1996. He stated that they established that the said allotment letter was fraudulent and was expunged from the records. He added that the land belonged to Pyrethrum Board of Kenya and that it was public land.



20. On cross examination by Mr. Kipkoech, PW7 confirmed that his evidence was based on the documents obtained from the general institution. He further confirmed that page 2 showed that the land parcel was owned by Madisup investments Limited where the Director was James Karanja Ngumo. He was shown document 5 where he confirmed that the Nakuru plots are not similar to the Eldoret plots. He was also shown the RIM where he confirmed that the suit land is separated by road and that the allotment letter for NKR/MUN/8/34 had not been revoked. He added that Eldoret Block 8/30 is not in the 1<sup>st</sup> Defendant's name. He confirmed that investigations have been ongoing since 2012. The witness was shown document 3 on the 1<sup>st</sup> Defendant's list of documents where he confirmed that the same shows that the 1<sup>st</sup> Defendant was the genuine owner of the suit property. He confirmed that the 1<sup>st</sup> Defendant's payment had been accepted by the government and he was issued with a title. He further confirmed that there has not been any complaint from NLC but added that the process of issuance of the lease was irregular.
21. On cross examination by Mr. Mburu, he confirmed that the suit land was allocated to the 1<sup>st</sup> Defendant by the Commissioner of Lands who had powers to allocate land. He also confirmed that there is no current charge against Mr. Gachanja. Upon re-examination he stated that the letter dated 28/4/1977 is not signed since it is a filed copy. This marked the close of the Plaintiff's case.

### **1<sup>st</sup> Defendant's Evidence**

22. Alexander Kipngetich Sitienei, the 1<sup>st</sup> Defendant herein adopted his statement dated 2/2/2022 as evidence in chief and stated that he is a retired brigadier. His list of documents was also adopted and marked as DEX 1 – DEX 12 as well as his further list of documents on 7/7/2021 and 10/11/2022 produced and marked as DEX 13, 14, 15, 16, 17 and 18 respectively. He stated that he acquired the suit land, fenced it and planted some crops. He further stated that at some point he had found that people had constructed a pit latrine on his land. He testified that they were then arrested and charged and that in court. He further testified that the Pyrethrum Board has never complained of his developments or the beacons. It was his testimony that he never abused his position as aide de camp to acquire the land since it was allocated to him by the then president. He stated that the pyrethrum headquarters is very close to the land and further that his title was confirmed to be genuine. He further stated that someone might have tried to interfere with the document in his file to suggest that he had a similar land in Eldoret as a scheme to grab his land. He testified that 20 years had lapsed before the case was filed and that the land does not belong to Pyrethrum Board of Kenya.
23. On cross examination by Mr. Mburu he confirmed that the land was allocated to him by the Commissioner of Lands.
24. On further cross examination by M.s Maina counsel for Ethics and Anti-Corruption Commission, he confirmed that he was allocated the suit land by the Ministry of Lands but that he could not remember when he had applied. He did not have a copy of the application. He was moving with former president from time to time. The land was near the Pyrethrum Board of Kenya but was not being used. He confirmed that across the railway line from the plot, there is a residential plot and that there is no space for development. He added that he was not the only one on a residential plot. He admitted that he did not receive a survey plan for the parcel as it was done by the Ministry. He admitted not to have a PDP and that he never developed the land since the matter was still pending in court. He confirmed that his original file was 182174 and added that it was not for him to decide ownership. He also confirmed that he has been paying rates and that he didn't know that the allotment letter was circulated. On re-examination he stated that he complied with the necessary requirement and that there was also a group of 4 people seeking the land. That marked the close of the 1<sup>st</sup> Defendant's case



## 2nd Defendant's Case

25. The 2nd defendant closed his case without testifying and or calling any witness.

## Plaintiff's Submissions

26. The Plaintiff did not file its submissions within the time frame given by the court but did the same belatedly out of time and after the 1<sup>st</sup> defendant had filed his. The gravamen of the plaintiff's submissions is that the Pyrethrum Processing Company of Kenya is a state Corporation established in 1962 as the Pyrethrum board of Kenya but converted to a private company in January 2014 under the Agricultural Food Authority Act no 13 of 2013. According to the plaintiff, the Government of Kenya holds 98% shares in the company. The land in dispute before alienation had been in possession of the Pyrethrum Processing Company of Kenya and was being used by farmers as a demonstration field and was also being used as a drying field for pyrethrum flowers. When the allotment was issued the land had been surveyed and allocated to the Pyrethrum processing company of Kenya.
27. The plaintiff in a nutshell submits that the transactions leading to the alienation of the suit property to the 1<sup>st</sup> defendant were null and void ab-initio and therefore nobody can derive a benefit from the same.

## 1<sup>st</sup> Defendant's Submissions.

28. The 1<sup>st</sup> Defendant filed his submissions on 7<sup>th</sup> February, 2023 where he gave a brief background of the case and identified the following issues for determination:
- 29.
- a. Whether the certificate of lease held and/or in favour of the 1<sup>st</sup> Defendant in respect of Nakuru Municipality Block 8/30 was irregularly and fraudulently acquired.
  - b. Whether the lease, certificate of lease and all entries on a land register in respect of Nakuru Municipality Block 8/30 should be rectified in favour of PPCK.
  - c. Whether the Plaintiff is entitled to costs of the suit.
30. On the first issue, he relied on Section 26(1) of the *Land Registration Act* and the case of Arthi Highway Developers Limited V West End Butchery Limited and 6 Others [2015] eKLR and submitted that from his exhibit number 14 forwarding a copy of the certified lease is prima facie evidence that the 1<sup>st</sup> Defendant is the rightful proprietor to the suit property. He submitted that the Plaintiff has pleaded fraud but failed to prove to the required standard.
31. He further submitted that he produced a certificate of lease, copy of the white card, allotment letter and evidence of payment thereby discharging any burden cast on him. The 1<sup>st</sup> Defendant cited the case of Munyu Maina V Hiram Gathiha Maina Civil Appeal No. 239 of 2009 and submitted that the 1<sup>st</sup> Defendant is the rightful owner of the suit property. He added that it is ultra vires for the Plaintiff to usurp the powers of the NLC as provided by Article 68(v) of *the Constitution* and Section 14 of the NLC Act with the mandate of investigating the legality of a title and recommend revocation.
32. On the second issue, he relied on the case of Edward Mwangi Irungu V Chief Land Registrar & 3 Others [2018] eKLR and Section 7 of the *Limitation of Actions Act* and submitted that the Plaintiff and PPCK have never made any complaint against the 1<sup>st</sup> Defendant. He further submitted that it has been 23 years since the 1<sup>st</sup> Defendant acquired ownership and possession of the suit property and



PPCK has never complained to the 1<sup>st</sup> Defendant. On the final issue, the 1<sup>st</sup> Defendant urged the court to maintain that the laid down principle that costs follow the event.

### **The 2<sup>nd</sup> Defendant's submissions**

33. The 2<sup>nd</sup> Defendant did not file submissions within the time frame given by the court but this court has considered the same. According to the 2<sup>nd</sup> defendant, the plaintiff has not discharged his burden of proof against the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant argues that he issued the letter of allocation after confirming that the land was available for allocation. There was no evidence on record to prove that the 2<sup>nd</sup> defendant acted illegally.
34. The 2<sup>nd</sup> defendant argues that the proceedings filed against him instead of the Attorney General by dint of the repealed Government Lands Act were unprocedural and a nullity in law.

### **Analysis and Determination**

35. I have considered the pleadings, the evidence on record and the submissions by the parties and I am of the view that the following issues need to be determined:
  - a. Whether the suit land constitutes public property set apart for use by Pyrethrum Processing Company of Kenya.
  - b. Whether the process of allotment letter was proper in law
  - c. Whether the Defendants acted fraudulently in alienating the suit property.
  - d. Whether the 1<sup>st</sup> Defendant holds a good title in respect of the suit property.

### **Whether the suit land constitutes public property set apart for use by pyrethrum processing company of kenya.**

36. On the first issue, this court finds that the Plaintiff led evidence that the suit land Nakuru Municipality block 8/30 was initially LR 451/2013 measuring 0.7024 ha as shown by the survey map F/R 142/148 prepared on 17<sup>th</sup> November 1977, approved on 7<sup>th</sup> of August 1978 and authenticated on 16<sup>th</sup> September 1981 and traced on 22<sup>nd</sup> of September 1981. The above was being done with the approval of the director of surveys pursuant to a letter dated 28<sup>th</sup> April 1977. The land was being surveyed for The Pyrethrum Board of Kenya. The Registry Index Map was amended on the 13<sup>th</sup> May 1981 to create the new parcel of land for the Pyrethrum Board of Kenya. The Registry index map has never been amended since 1981. This court finds that by the time the 1<sup>st</sup> defendant was being issued with the allotment letter on the 31<sup>st</sup> May 1996, the property had already been allocated to The Pyrethrum Board of Kenya and made public land owned by the pyrethrum Board of Kenya in 1981, though a certificate of title was not issued to the Board because it was mistakenly believed that the custodians of public land such as the 2<sup>nd</sup> defendant would faithfully protect public land from takeover by individuals for their private gains. The 2<sup>nd</sup> defendant in breach of this public duty allocated the land to the 1<sup>st</sup> defendant without an application and due process as there is no evidence that the other departments of government in Nakuru were consulted as most public land at that time was identified through possession and utilization.



37. According to section 2 of the Government Lands Act (Repealed), the following is the definition of unalienated land;

“unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.

38. Section 3 of the Physical Planning Act, Cap 286 of the Laws of Kenya defines unalienated land in similar fashion. The parcel land in dispute though unalienated at the time of the issuance of the allotment letter was surveyed, demarcated and a parcel number issued, and already being utilized by an institution of government.

39. The court in High Court Civil Appeal No. 288 of 2010, Kipsirgoi Investments Limited vs Kenya Anti-Corruption Commission relied on section 2 of the Government Lands Act and Section 3 of the Physical Planning Act when it found that the suit property was planned as an open space and held that the subsequent lease under section 3 of the GLA was irregular as the land was already alienated.

Under section 3 of the Government Lands Act (Repealed), it states;

3. 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;

The act further states;

The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)—

- 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;

40. The 1<sup>st</sup> defendant has neither produced his application to the president of the Republic of Kenya for the allocation of the suit land nor an allocation of the said parcel of land by the said president. The Commissioner of Lands had no power to allocate the suitland as it was not set to be used 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

41. In James Joram Nyaga & Another v the Hon. Attorney General & Another [2007] eKLR, the court, in reference to sections 3 and 7 of the Government Lands Act stated;

The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap 281 Laws of Kenya.



42. The land in dispute was already set aside for public utilities and was already being utilized by the Pyrethrum Board of Keya when the 1<sup>st</sup> defendant was allocated and therefore it could not be deemed un-alienated because it was already set apart for government use. The 2<sup>nd</sup> defendant therefore had no authority in law to make the alienation and no interest could be conferred upon the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant did not procedurally obtain title as the Suitland was public land. Section 26 states as follows; -

- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

#### **Whether the process of allotment letter was proper in law**

43. Going to the second issue for determination, PW1 testified that the suit land was allocated to the 1<sup>st</sup> Defendant vide an allotment letter. He further testified that Kshs. 127,000 was received on 11<sup>th</sup> December, 1997. He also admitted to have signed the allotment letter and stated that he never revoked it to date. He confirmed that the letter dated 28<sup>th</sup> April, 1997 showing the unsurveyed plot for Pyrethrum Board did not have with it a letter requesting for the RIM. There is evidence of an allotment letter dated 31<sup>st</sup> May, 1996 issued to the 1<sup>st</sup> Defendant as well as a payment receipt of Kshs. 127,070. But the allotment letter was not accompanied with a PDP.

44. I have considered the evidence on record and submissions by the 1<sup>st</sup> defendants counsel and do find that legal process that leads allocation and ownership of Government land before the advent of *the Constitution* of Kenya 2010 has been explained by this court time and again. The initial process was to approach the municipal council in which the land to be disposed was situate, if the land is a town plot, who had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. There is no evidence that this process was followed.

45. The council was required 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. Had the Council visited the suit land it could have established that the same was meant for the use by the Pyrethrum board of Kenya as it then was.

In *Harison Mwangi Nyota v Naivasha Municipal Council & 20 others* [2019] eKLR the court held:-

“...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 1<sup>st</sup> defendant, the local authority (1<sup>st</sup> 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 1<sup>st</sup> defendant issued the letters dated 1/12/1992, 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.”

46. The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. The 1<sup>st</sup> defendant did not produce any part development plan.

In *Nelson Kazungu Chai & 9 Others vs. Pwani University College* (2014) eKLR, it was held:-

“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 un-alienated 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.”

47. 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).
48. 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.
49. The fourth step would be for the gazettelement 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. 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).
50. 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.
51. In *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* 182/1992 (Nyeri); and in *Dr. Joseph N.K. Arap Ng’ok v Justice Moiyo Ole Keiyua & 4 others* C.A.60/1997 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.”

52. 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.



53. In *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others* [2014] Eklr the court held:-

“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 21/10/1971 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 17/6/1988 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.”

54. The allotment letter also must have attached to it a part development plan (PDP). In *African Line Transport Co. Ltd Vs The Hon .AG, Mombasa HCCC No.276 of 2013 Njagi J* as he then was 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.”

55. And again, in *Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR*, it was held:-

“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.”

56. 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.

57. In *Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) 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.”

58. On this issue, I do find that in the absence of an application for allocation to the president, allocation by the president, part Development Plan the whole process was a nullity as due process was not followed resulting into the loss of public property.

#### SUBDIVISION - WHETHER THE DEFENDANTS ACTED FRAUDULENTLY IN ALIENATING THE SUIT PROPERTY.

59. The Plaintiff alleged that the 1<sup>st</sup> Defendant’s lease was fraudulently obtained and that the record was manipulated.

60. In the case of *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR the court held as follows:

“In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis mine)

In this case, fraud cannot be imputed on the part of the respondent by the mere fact that the record in relation to the subject property was missing at the Lands Registry. To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding.”

61. PW6 on cross examination confirmed that he was not certain who allegedly manipulated the record. He also confirmed that Gachanja was a Commissioner of Lands and that he has never been charged in this matter. PW7 confirmed that the 1<sup>st</sup> Defendant was issued with a lease Certificate and that was the genuine owner. He also admitted that there has been no complaint from the National Land Commission. It was his testimony that there were intentions to irregularly acquire the land and that the user is usually indicated in the PDP. The 1<sup>st</sup> Defendant on the other hand admitted to not having a PDP and that the land is located next to Pyrethrum Board offices. He emphasized that he had a lease document which he rightfully acquired and further that Kenya Railways have never lodged a complaint against him. This court finds that even if the property was government land available for allocation by the president, there was no evidence that the 1<sup>st</sup> defendant was allocated the land by the president of the republic of Kenya.
62. This court is of the view that the plaintiff has failed to prove that the acts of the 1<sup>st</sup> defendant and the second defendant were actuated with fraud. However, I do find that the lease certificate in the name of the 1<sup>st</sup> Defendant was a nullity as the land was not available for allocation and that the allocation to the 1<sup>st</sup> defendant and final issuance of a certificate of lease was an illegality. Though the Plaintiff has failed to prove the alleged fraud against the Defendants the plaintiffs have proved that the process of allocation



of the suit-land was a nullity as the property had been set aside for public use by the department of lands for the Pyrethrum Board of Kenya.

63. On the fourth issue as to whether the 1<sup>st</sup> Defendant holds a good title in respect to the suit property, having found that the allotment and registration of Nakuru Municipality Block 8/30 to the 1<sup>st</sup> defendant was a nullity, it follows that the resultant lease certificate registered in the 1<sup>st</sup> Defendant's name is not a good title. Having considered and reviewed all the evidence and material placed before the court, I find and hold that the Plaintiff has proved its case against the Defendants on a balance of probabilities. Accordingly, the Plaintiff's suit is allowed and I do grant a declaration that the Certificate of Lease held and/or in favour of 1<sup>st</sup> Defendant in respect of Nakuru Municipality Block 8/30 was irregularly and fraudulently acquired, consequently null and void, ineffectual to confer any right, interest or title upon the 1<sup>st</sup> Defendant. I do grant an order for rectification of the land register by cancellation of the lease, certificate of lease and all entries on the Land Register in respect to Land Parcel Nakuru Municipality Block 8/30, held or made in favour of the 1<sup>st</sup>
64. Defendant so as to restore the suit property to the PPCK. Lastly, I do grant an order of permanent injunction against the 1<sup>st</sup> Defendant his agents, servants or assigns restraining them from leasing, transferring, charging, taking possession or in any other manner howsoever from dealing with the suit property Nakuru Municipality Block 8/30 her than by transfer, delivery up or surrender of the same to PPCK. Costs and interest to be paid by the defendants.

**JUDGMENT DATED SIGNED AND DELIVERED VIA EMAIL AT NAKURU THIS 9<sup>TH</sup> DAY OF MARCH 2023.**

**A. O .OMBWAYO**

**JUDGE**

