



REPUBLIC OF KENYA



**Njunia v City Council of Nairobi & 4 others (Civil Suit 903 of 2004)
[2023] KEHC 19163 (KLR) (Civ) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 903 OF 2004

CW MEOLI, J

JUNE 12, 2023

BETWEEN

ROBERT MATHENGE NJUNIA PLAINTIFF

AND

CITY COUNCIL OF NAIROBI 1ST DEFENDANT

THE CHIEF LAND REGISTRAR 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

**SPERANZA NYAGUTHII KARIUKI (SUED AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF NICHOLAS HIUHU
MURITHI) 4TH DEFENDANT**

DOMINIC ICHUGU GACHANJA 5TH DEFENDANT

JUDGMENT

1. Robert Mathenge Njunia, (hereafter the Plaintiff) filed a suit vide a plaint dated August 23, 2004 and amended on October 27, 2005. He named as defendants the City Council of Nairobi, The Chief Land Registrar, The Hon. Attorney General, Nicholas Hiuhu Muriithi (now deceased) and Dominic Ichugu Gachanja (hereafter the 1st, 2nd, 3rd, 4th and 5th Defendant/Defendants). By his suit, the Plaintiff was seeking several reliefs, namely, a declaration that the issuance of lease in respect of land parcels Nos. Nairobi/Block 63/782 and Nairobi/Block 63/783 by the 2nd Defendant in favour of the 4th and 5th Defendant respectively, was null and void for fraud on the part of the 1st Defendant; an order directing the 2nd Defendant to cancel the said leases in favour of the 4th and 5th Defendant; and an order directing the 2nd Defendant to issue the leases in respect of the parcels in favour of the Plaintiff; and costs of the suit and interest.



2. It was averred that on or about February 2007 the 1st Defendant issued letters of allotment to the Plaintiff in respect of Plots No 491 and 492 both in Jamhuri Phase 2 in Nairobi following which the Plaintiff made the requisite payments in respect of the 2 Plots and at all material times the 1st Defendant represented to the Plaintiff that the 2 plots were for his exclusive use. That in or about March 2007, some unknown persons entered his plots claiming interest therein and that upon conducting an official search, the Plaintiff found that the Plot No 491 had been registered by the 2nd Defendant as Nairobi/Block 63/782 in the name of the 4th Defendant while Plot No 492 had been registered as Nairobi/Block 63/783 in the name of the 5th Defendant.
3. It was further averred that on earlier in 2004, the 1st Defendant confirmed to the Plaintiff in writing that Plots No 491 and 492 (now Nairobi/Block 63/782 and Nairobi/Block 63/783, respectively) belonged to the Plaintiff and hence he averred that the issuance of the certificate of lease to the 4th and 5th Defendants by the 2nd Defendant was fraudulent and illegal on the part of the 1st Defendant. That the 4th and 5th Defendant obtained the said respective titles fraudulently and illegally to the detriment of the Plaintiff and therefore the titles ought to be cancelled and or annulled to the Plaintiff's favour.
4. The 1st Defendant filed a statement of defence dated September 28, 2004 and amended on June 3, 2011 essentially admitting having issued to the Plaintiff with letters of allotment in respect of Plots No 491 and 492 in Jamhuri (hereafter the suit property) and that all required payments regarding the two plots had been made at the time of filing suit by the Plaintiff. The 1st Defendant, however, proceeded to deny the other key averments in the plaint.
5. The 2nd and 3rd Defendant on their part filed a joint statement of defence dated May 20, 2005 denying the key averments in the plaint and averred that if the suit property was registered in the names of the 4th and 5th Defendants then the said registration was done lawfully and in good faith, upon proper documents being presented for registration. It was further averred that the 2nd Defendant is not charged with the responsibility of preparing the leases between the parties herein but merely facilitates registration and issuance of titles. Further the said 2nd and 3rd Defendants raised a preliminary objection on a point of law that the suit herein was fatally defective for contravening the mandatory provisions of Section 3 of the *Public Authorities Limitation Act* Cap 39. The point was not taken up during the proceedings.
6. The 4th and 5th Defendant equally filed a joint statement of defence dated October 12, 2004 denying the key averments in the plaint and averred that they were duly registered as the exclusive lessees of the suit premises by the 2nd Defendant upon due compliance with the lawful allotment procedures of the 1st Defendant, and thus hold a valid and good title to the suit properties. It was further averred that if the Plaintiff ever obtained any letters of allotment in respect of the suit properties, then the same were issued illegally and irregularly, prior letters of allotment having already been issued to the 4th and 5th Defendants and that the subsequent letters issued to the Plaintiff were null and void and their effect and purpose subsequently extinguished by the issuance of titles to the 4th and 5th Defendant.
7. An agreed list of issues was filed on October 14, 2005.
8. During the trial, the Plaintiff testifying as PW1 identified himself as a doctor by profession. The gist of his evidence was that in February 1997 he bought from one Lawrence Kamau Plot No 491 and Plot No 492 from Fredrick W. Gachie, both vendors, and then employees of the 1st Defendant. That the vendors showed him letters of allotment in their favour issued by the 1st Defendant and thereafter effected transfer of the plots at Kshs. 300,000/- each. It was his evidence that before the transfers were effected, both vendors had in writing requested the Director of Nairobi City Council Planning & Architecture to transfer ownership to him.



9. PW1 tendered as exhibits the letters of allotment as P. Exh.2 (a) & P. Exh.2 (b) and receipts dated September 10, 1999 for annual rent for the respective plots as P. Exh.3 (a) & P. Exh.3 (b). He went on to state that he took possession and secured the plots by fencing them while pursuing registration of the leases, and approvals for building plans he had submitted between 2001 to 2003. He stated that in 2004 he was referred to the 1st Defendant's advocates and paid Kshs. 66,730/-, receipt thereof which he adduced as P. Exh.4, being legal fees to process the title; that as he pressed for the titles, he was informed that unknown 3rd parties had entered the plots and started excavating for purposes of laying a foundation for construction.
10. He subsequently reported the incident to the police as his advocate wrote a complaint letter to the 1st Defendant (P. Exh.5) and thereafter received a response dated April 14, 2004 (P.Exh.6), the latter confirming that the 1st Defendant's records showed that the plots were owned by the Plaintiff. It was his evidence further that when he later learned that the plots had been registered as Nairobi/Block 62/782 and Nairobi/Block 62/783 in the names of the 4th and 5th Defendants, he proceeded to place a caution on the said plots.
11. He further stated that during investigations following an invasion of the plot which he reported to police, the 4th and 5th Defendant were found to be in possession of certain suspect documents and were later arrested and charged in a criminal case that is partly heard. He concluded by asserting that he acquired the plots legally and therefore the court ought to find that he had acquired a good title in respect of the suit property and to grant him the reliefs sought.
12. Under cross-examination he reiterated having bought and paid for both Plot Nos. 491 and 492 and that despite the original letters of allotment being in the respective names of the two vendors, it was only after payment that the plots were transferred to him. In respect of Plot No 491, he said he could not tell whether the respective allotment letter was originally in favour of Lawrence Kamau. That the original owners of the two plots were senior employees of the 1st Defendant. He asserted that the letters of allotment were transferred to him, admitting however that the two vendors did not execute any sale agreement or transfers in respect of the Plots. He further confirmed that he did not carry out a search on the suit properties prior to the purchase but had been paying rates and yearly rent since February 12, 1997.
13. He admitted that the vendors did not show him their evidence of formal acceptance of the original offers of allotment or proof of prior purchase. That the search in respect of the two plots done between March –April 2004 had revealed that the plots were registered on July 24, 2002 in the names of the 4th and 5th Defendant respectively and he had thereafter proceeded to register a caution on the titles. He further confirmed that the 2nd and 3rd Defendants played no role in allocation of the plots and admitted that he has no complaint against them, save for the 2nd Defendant's action of registering the plots in favour of the 4th and 5th Defendants.
14. During re-examination he admitted not having seen the original allotment letters but however believed P. Exh.2(a)&(b) to be the original and genuine plot allotment letters. And that despite having paid the registration fees the lease documents could not be prepared. He blamed the 1st Defendant for his predicament.
15. Oscar Ingubu Lumula testified as PW2. He identified himself as a Civil Servant working in the City Planning Department of the 1st Defendant (now Nairobi County) and proceeded to adopt his witness statement dated June 3, 2014 as his evidence- in- chief. Upon cross-examination he testified that he joined the 1st Defendant's Planning department in 1996 whereas the Plots in question were allocated in 1992. He confirmed the existence of two sets of letters of allotment in respect of Plot No 491, the



- first letter of allotment being the one dated September 5, 1992 in favour of the 4th Defendant and the second being the one dated February 12, 1997 in respect of the Plaintiff. This scenario was replicated regarding Plot No 492, with the first letter of allotment being the one dated September 5, 1992 in favour of the 5th Defendant and the second being the one dated February 12, 1997 in respect of the Plaintiff. Therefore, confirming that the 4th & 5th Defendants' letters of allocation were issued earlier.
16. He also confirmed the existence of a certificate of lease or lease document for Plot Nos. 491 & 492 issued in favour of the Plaintiff. In re-examination he reiterated that the reference numbers in respect of the allotment letters to the 4th and 5th Defendant Plots and Plaintiff's plots were similar but affirmed that the mayor and town clerk of the 1st Defendant had executed their part on the leases.
 17. The 1st to 3rd Defendant did not call any witnesses.
 18. On behalf of the estate of Nicholas Hiuhu Muriithi, his representative and 4th Defendant, Speranza Nyaguthie Kariuki testified as DW1. She identified herself as a widow to the late Nicholas Hiuhu Muriithi, and representative of his estate having been granted letters of administration. She asserted the deceased had recorded a statement and often updated her on this dispute. She equally recorded a witness statement dated January 25, 2021 which she adopted as part of her evidence -in-chief and proceeded to tender the documents in the list dated May 27, 2009 and January 25, 2021 as D. Exh.1-8 as they appear therein, respectively.
 19. It was her evidence that her late husband was in 1992 allocated LR. No Nairobi/Block 63/782 which the Plaintiff claims. She asserted to be in possession of the original certificate of lease and the property for which she has regularly paid rates and other dues. She urged the court to dismiss the suit and lift the caution on the suit property to enable her to develop it.
 20. The 5th Defendant testified as DW2. He began by asserting ownership on LR. No Nairobi/Block 63/783 formerly Plot No 492 and proceeded to adopt his witness statement dated 08.06.2011 as part of his evidence -in-chief. The gist of his evidence was similar to that of the 4th Defendant in respect of ownership and acquisition of LR. No Nairobi/Block 63/783. DW 2 relied on D. Exh.1-8 in support of the averments in his pleadings. He equally urged the court to dismiss the suit and lift the caution on the suit property to enable him to develop the same.
 21. At the close of the trial, only the 4th and 5th Defendant filed submissions. Counsel for the 4th and 5th Defendant confined his submission to the key issues whether the Plaintiff is entitled to the reliefs sought in the plaint. Addressing the court on the particulars of fraud imputed by the Plaintiff, counsel relied on the decision in *Moses Parantai & Peris Wanjiku Mukuru (suing as the legal representatives of the estate of Sospeter Mukuru Mbeere – deceased) v Stephen Njoroge Macharia* [2020] eKLR to contend that the Plaintiff did not adduce any evidence in support of the allegations of fraud therein set out.
 22. That it is trite where fraud is alleged, it is not enough to simply infer fraud from the facts. Counsel submitted that the 4th and 5th Defendant have duly registered leases in their favour since 2002 whereas the Plaintiff had no lease to the suit properties as at filing of the suit. Hence, he contended that the Plaintiff has no title capable of being fraudulently obtained by the 4th and 5th Defendant.
 23. Counsel cited the provisions of Section 26 of the *Land Registration Act*, 2012, the decisions in *Moses Parantai* (supra), *Samuel Odhiambo Oludhe & 2 Others v Jubilee Jumbo Hardware Limited & Another* [2018] eKLR and *Ali Mohamed Dagane (granted power of attorney by Abdullabi Mohamed Dagane, suing on behalf of the estate of Mohamed Haji Dagane) v Hakar Absbir & 3 Others* [2021] eKLR to submit that the Plaintiff failed to prove the allegation of fraud. And that certificates of lease in the



names of the 4th and 5th Defendants produced evidenced their good and indefeasible titles that ought to be upheld by this court in the absence of proof of fraud by the Plaintiff.

24. It was further argued that an allotment letter does not confer interest in land and is merely an offer of a land parcel subject to acceptance by the allottee and compliance with stipulated requirements. That the Plaintiff has failed to tender evidence of acceptance in respect of the offers made to his vendors and payments of statutory fees and fulfilment of conditions subject to which the offer was made as to enable the grant of lease. Consequently, it was counsel's contention that the Plaintiff could not rely on the purported allotment letters to defeat the 4th and 5th Defendant's titles.
25. Counsel pointed out that in the unlikely event that this was a case of double allocation of the suit property, the 4th and 5th Defendants having acquired leases that were registered prior to claims made by the Plaintiff, the first in time doctrine should prevail in their favour. The decisions in *African Inland Church – Kenya (Registered Trustees) v Catherine Nduku & 12 Others* [2017] eKLR and *Kamau James Njendu v Serah Wanjiru & Another* [2018] eKLR were called to aid in the foregoing regard. Counsel further argued that the process of allotment and subsequent registration of leases in favour of the 4th and 5th Defendants was lawful and regular. Therefore, the Plaintiff's claim could not lie against the said Defendants concerning transactions they were not privy to as alleged between the Plaintiff, the 1st Defendant and other third parties not before court. The court was thus urged to dismiss the suit and lift the caution placed on the suit properties.
26. The court has considered the pleadings, evidence as well as the submissions on record. From the foregoing, it is the court's view that the overarching question falling for determination is whether the Plaintiff has established to the required standard his claims against the Defendants, and if so, what reliefs ought to be granted.
27. In that regard, the Plaintiff's pleadings before the court are pertinent as we shall see. The Court of Appeal in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, addressed itself as follows:-

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

28. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”



29. The Plaintiff's claim against the 1st, 4th and 5th Defendant as pleaded in his amended plead is founded on alleged fraud regarding the acquisition of Plot No 491 and Plot No 492 (now Nairobi/Block 63/782 and Nairobi/Block 63/783) which properties are registered respectively in the names of the 4th and 5th Defendant. The Plaintiff contends that the issuance of the certificates of title to the 4th and 5th Defendant by the 2nd Defendant was fraudulent and illegal on the part of the 1st Defendant. It is averred that the 4th and 5th Defendant obtained the respective titles fraudulently to the detriment of the Plaintiff.
30. To contextualize the Plaintiff's cause of action against the Defendants, at paragraph 12 and 12A of the amended plead, it is averred that:-

“ 12. The Plaintiff avers that the issuance of the certificate of lease to the 4th and 5th Defendant by the 2nd Defendant was fraudulent and illegal on the part of the 1st Defendant.

Particulars of Fraud

- a. Causing plots number 491 and 492 aforesaid to be registered as Nairobi/Block 63/782 and Nairobi/Block 63/783 in favour of the 4th and 5th Defendant.
 - b. Causing the Plaintiff to believe that he was the sole beneficiary of the two plots aforesaid.
 - c. Causing the said plots to be allocated and or registered in favour of the 4th and 5th Defendant while still being allocated to the Plaintiff.
 - d. Causing the Plaintiff to pay ground rent up to the year 2005 in the belief that the said plots belong to him.
 - e. Causing the Plaintiff to incur legal and other expenses in the honest belief that the said plots would be registered in his favour.
 - f. Causing the said plots to be registered in favour of the 4th and 5th Defendants without notice to the Plaintiff.
- 12A. The Plaintiff further avers that the 4th and 5th Defendant obtained the said titles fraudulently to the detriment of the Plaintiff.

Particulars of Fraud

- a. Obtaining the respective title deeds while knowing, or having reason to believe land had been allocated to the Plaintiff by the 1st Defendant.
- b. Failing to inquire from the 1st Defendant as to the true ownership of the respective land.
- c. Obtaining title to the respective land in disregard of the 1st Defendant's record as to the true ownership.
- d. Fraudulently colluding with persons unknown to the Plaintiff to obtain the respective title deeds irregularly.” (sic)



31. Section 26 of the [Land Registration Act](#) provides that:-

- “(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”.

32. Therefore, a certificate of title can be impeached if the same was obtained by fraud, misrepresentation, or was acquired illegally, unprocedurally or through a corrupt scheme. The onus was on the Plaintiff to specifically prove the particulars of fraud pleaded against the Defendants. The undisputed facts are that as at hearing of the suit, titles by way of certificates of lease in respect of the two plots herein, now known as Nairobi/Block 63/782 and Nairobi/Block/ 63/783 were already issued in favour the 4th and 5th Defendants. The Plaintiff’s contention is that the acquisition of the leases was fraudulent and subsequent registration of the suit properties in favour of the 4th and 5th Defendant marred by illegality.

33. Two broad and related issues arising therefore are whether the Plaintiff purchased and owned the suit properties in the material period and whether he has demonstrated fraudulent acquisition of the suit properties by the 4th and 5th Defendant. Tunoi JA (as he then was), in [Vijay Morjaria vs Nan Singh Madhu Singh Darbar & Another](#) [2000] eKLR stated that; -

“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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

34. The standard of proof in respect of the second issue is higher. The Court of Appeal in [Kinyanjui Kamau vs George Kamau](#) [2015] eKLR expressed itself as follows;

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”



35. In *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* [2004] eKLR, the same court held that:-

“Fraud is a serious quasi-criminal imputation, and it requires more than proof on a balance of probability though not beyond reasonable doubt”.

36. The Plaintiff's case before this court, is that in February of 2007 he bought the suit properties from one Lawrence Gachie and F.W. Chege who were at the time employees of 1st Defendant and beneficiaries of a plot allocation scheme for the 1st Defendant's employees. He produced exhibits marked P. Exh.2(a) and P. Exh.2(b) being letters of allotments to the said vendors in respect of the said plots and receipts dated September 10, 1999 in respect annual rent for the respective plots. (P. Exh.3 (a) & P. Exh.3 (b)).

37. Based on this, the Plaintiff contends that he is the lawful proprietor of the suit properties now registered in the name of the 4th and 5th Defendant. To further support his case, he relied on a letter from the 1st Defendant dated April 14, 2004 (P. Exh.6) confirming that records held by the said Defendant showed that the plots were and indeed belonged to the Plaintiff. The 4th and 5th Defendant have vehemently countered the Plaintiff's position on the issue by asserting that they were allocated suit properties in 1992 vide D. Exh.1 and they paid the requisite fees in fulfilment of the said offer of allotment, and subsequent rents and rates on the plots (D. Exh.5.).

38. From the evidentiary material tendered before this court it is manifestly apparent based on P. Exh.2 (a) & P. Exh.2 (b) and D. Exh.1 that the 4th and 5th Defendant's letters of allotment were issued in 1992 prior to the letters of allotment relied on by the Plaintiff that were issued in the in 1997. What this court further gathers to be the 4th and 5th Defendants' case is that they were not only original but direct beneficiaries of their letters of allotment from the 1st Defendant. Whereas the Plaintiff was a secondhand beneficiary of the letters of allotment pursuant to an alleged purchase at a consideration of Kshs. 300,000/- for each plot.

39. During cross-examination the Plaintiff admitted that he was unable to tell prior to the sale transaction whether Lawrence Kamau and Fredrick W. Gachie (alleged vendors) who allegedly sold him the two plots had been issued with or were the beneficiaries of the original letters of allotment for the suit plots. Equally, the Plaintiff admitted that he did not carry out due diligence prior to the purchase of the plots to authenticate that indeed the plots in question were allocated by the 1st Defendant to Lawrence Kamau and Fredrick W. Gachie or were owned by the said vendors. Moreover, no written sale agreement executed in respect of the sale was tendered before the court at the trial.

40. The alleged sale was a disposition of interest in land, and it is strange that no written sale agreement was produced, raising the legal question whether indeed the alleged transaction complied with the requirements of the *Law of Contract Act* and therefore bringing into question the validity of the alleged sale transaction. Section 3(3) of the *Law of Contract Act* requires that any disposition of interest in land shall be in writing.

41. The letters dated February 5, 1997 addressed to the Director of City Planning & Architecture (P. Exh.2 (a) & P. Exh.2 (b)) in respect of the alleged sale hardly aid the Plaintiff's case in the absence of a sale agreement. This is compounded by the fact that the original letters of allotment purported to have been attached to the foregoing letters, and allegedly issued in favour of the vendors Lawrence Kamau and Fredrick Gachie were not produced at the trial for the court's benefit.

42. The court has examined the asserted letters of allotment in respect of Plot No 491 and Plot No 492 produced here by the Plaintiff. The said allotments alleged therein were made upon transfers by Lawrence Kamau and Fredrick Gachie of the plots to the Plaintiff. Without the benefit of the original



- allotment letters in favour of the said vendors the latter add no value to the Plaintiff's claim. Neither Lawrence Kamau nor Fredrick Gachie was called as witnesses to shed light on the circumstances of their own acquisition and subsequent sale of the subject plots to the Plaintiff.
43. What of the evidence of PW2? For starters the witness acknowledged the existence of two sets of letters of allotment in respect of Plot No 491 and 492, the earliest being in favour of the 4th and 5th Defendants and the latest to the Plaintiff. Nevertheless, he disputed the letters of allotment issued to the 4th and 5th Defendant by stating in his written statement that "our records have no information regarding the allotment letter. Also, I have noted the two allotment letters bears the same reference number which is not possible".
 44. Indeed, a perusal of the 4th and 5th Defendants' letter of allotment reveals that they bear the same reference numbers. However, PW2 did not produce the records he referred to in his statement in justifying that the Plaintiff was the rightful proprietor of the plots in question. Further, despite admitting to the existence of certificate of leases or lease documents for Plot 491 & 492 in favour of the Plaintiff he did not produce any of the said documents for the court's examination. In the court's view, as opposed to the consistent and well documented account of the 4th and 5th Defendants, there are too many gaping holes in the evidence of the Plaintiff's alleged transaction in the acquisition of the suit plots and asserted title. On a balance of probabilities, the Plaintiff has not demonstrated his ownership of the suit properties. This should dispose of the matter, but the Court will briefly consider the second issue for completeness.
 45. Has the Plaintiff demonstrated fraudulent acquisition of the suit properties by the 4th and 5th Defendant in cahoots with the 1st Defendant as pleaded in the plaint? In considering this aspect, it is well to reiterate the high standard of proof required. The Plaintiff in his evidence before this court emphasized the alleged ongoing criminal case in Kibera Law Courts in respect of the suit property. However, the case is unconcluded, and no adequate particulars thereof were adduced in evidence.
 46. Further, the Plaintiff failed to tender evidence from the 1st Defendant that would have confirmed the identity of the original allottees of the suit properties as of 1992 and how the suit properties were subsequently transferred to the Plaintiff and or 4th and 5th Defendant as the case may be. Neither was alleged collusion between the said Defendants and the 1st Defendant demonstrated through solid and credible evidence. The fact that the 1st Defendant had in 2004 confirmed to the Plaintiff that he was the rightful owner of the property without more, cannot form the basis of the alleged fraud.
 47. The Plaintiff while admitting the limited role of the 2nd Defendant confined to the registration of the disputed lease in favour of the 4th and 5th Defendants did not tender evidence to demonstrate that the 4th and 5th Defendants were aware of the prior existence of his title, if any, to the suit plots or failed to make diligent inquiries thereon and proceeded to fraudulently obtain title in their own name thereby depriving him of his title. I agree with the submission by the 4th and 5th Defendants that the Plaintiff, on the evidence before the Court has not demonstrated that he had acquired a good title or other interest in the suit property that was capable of being taken away through fraud.
 48. If anything, the 4th and 5th Defendants were not only direct holders of original letters of allotment in respect of the suit properties that were issued several years before the Plaintiff's alleged purchase of the plots, but secondly, the said Defendants eventually acquired leases that were registered in their favour, apparently having complied with the conditions of the letters of allotment. See D.Exh. 1-5.



49. In *Rukaya Ali Mohamed v David Gikonyo Nambacha & Another* Kisumu HCCA No 9 of 2004, the Court (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 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. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

50. The Plaintiff has failed to demonstrate any of the particulars of fraud alleged in his plaint, and consequently to mount a case to the required high standard for the impeachment of the title held by the 4th and 5th Defendants as protected by Section 26 of the *Land Registration Act*. This case to my mind was on all accounts yet another instance of the all too familiar case of double allocation of the same parcel of land to different parties, either by the 1st Defendant or unscrupulous parties within its ranks. While probably irregular or improper, such double allocation without more, is not evidence of fraud or fraudulent conduct by the concerned authority or beneficiary parties involved.

51. On the question whether the Defendants fraudulently deprived and or fraudulently instigated the acquisition of the suit properties in favour of the 4th and 5th Defendants to the disadvantage of the Plaintiff, the answer is that the Plaintiff has not discharged his burden of proof as stipulated in *Karugi* (supra) and *Kinyanjui* (supra). The Court of Appeal in *CO Okere v Esther Nduta Kiiyukia & 2 others* [2019] eKLR while addressing the threshold of establishing fraud observed that “fraud is proved at a higher standard above balance of probabilities. To succeed, the appellants needed not only to plead and particularize fraud, but also a basis by way of evidence, upon which a trial court would make a finding.”

52. Under section 107 of the *Evidence Act*, the burden of proof lay with the Plaintiff and if his evidence did not support the facts pleaded, he failed as the party with the burden of proof. See the case of *Wareham t/a A.F. Wareham* (supra). In the circumstances, the Plaintiff’s suit against the Defendants must fail and is hereby dismissed with costs to the 4th and 5th Defendants.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 12TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: N/A

For the 1st Defendant: Ms. Katagai

For the 4th and 5th Defendants: Mr. Orenge

C/A: Carol

