



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. JUDICIAL REVIEW APPLN. NO. 14 OF 2018

IN THE MATTER OF ARTICLES 27, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND ACT

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF SURVEYS.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

KENYA MEAT COMMISSION.....3RD RESPONDENT

AND

SCHON & ASSOCIATES LIMITED.....1ST EX-PARTE APPLICANT

BEN NYAKUNDI.....2ND EX-PARTE APPLICANT

PRINCETHORPE APARTMENTS LTD.....3RD EX-PARTE APPLICANT

K-MED INSTITUTE.....4TH EX-PARTE APPLICANT

ELDA OMARI.....5TH EX-PARTE APPLICANT

SIMEON KIPGETICH MUTAI.....6TH EX-PARTE APPLICANT

AND

THE NATIONAL LAND COMMISSION.....INTERESTED PARTY

JUDGMENT

1. In the Notice of Motion dated 14th June, 2018, the Ex-parte Applicants are praying for the following orders:

a. An order of certiorari to remove to this Honourable Court for the purposes of being quashed, the 1st Respondent's entire decision delivered on or around December, 2017 purporting to cancel the Applicants' Survey Plan F.R. No. 572/150 and Comps. No. 66904 thereby reinstating it together with L.R. Numbers 30596-30602.

b. An order of certiorari to remove to this Honourable Court for the purposes of being quashed, the 1st Respondent's entire decision delivered on or around December, 2017 purporting to approve Survey Plan F.R. No. 608/165 and Comps. No. 71183; and L.R. No. 31847 to the 3rd Respondent.

c. An order of certiorari to remove to this Honourable Court for the purposes of being quashed, the 1st Respondent's entire decision delivered on or around December 28, 2017 purporting to issue Deed Plan No. 420804 to the 3rd Respondent.

d. An order of mandamus directed at the 1st Respondent requiring it to immediately process and issue Deed Plans in respect of L.R. Numbers 30596-30602 in favour of the Applicants.

e. An order of prohibition directed towards the 2nd Respondent restricting/prohibiting him, his agents, officers and any person acting under those offices from issuing Indent Reference (I.R) Number and/or registering Deed Plan Number 420804 by the 3rd Respondent.

f. An order of certiorari to remove to this Honourable Court for the purposes of being quashed, the 2nd Respondent's entered decisions registering Deed Plan Number 420804 and issuing Title Deed for L.R. Number 31847 in the event that the 3rd Respondent has received title to the suit property.

g. An order of certiorari to remove to this Honourable Court for the purposes of being quashed, the 2nd Respondent's entire decision permitting alteration of the records of the Applicants in the Senior Plot Records Officer (SPRO) and deletion of the Applicants' L.R. Numbers 30596-30602 and File and substituting the same with L.R. Number 31847 and File Number 274847 respectively.

h. An order of prohibition directed towards the 3rd Respondent restricting/prohibiting it, its agents, officers and any person acting under those offices from compulsorily acquiring the suit property in an illegal and irregular manner.

i. An order of prohibition directed towards the 1st and the 2nd Respondent restricting/prohibiting them, their agents, officers and any person acting under those offices from enabling the 3rd Respondent to compulsorily acquire the suit property in an illegal and irregular manner.

j. That the costs for and incidental to the Judicial Review proceedings herein be provided for.

2. The Application is supported by the Statutory Statement of the Applicants who have averred that they are the holders of Letters of Allotment dated 23rd February, 1998 in respect of unsurveyed Agricultural plot numbers A, B, C, D, E, F and G, all located in Mavoko Machakos County.

3. According to the Ex-parte Applicants, after being allocated the said plots, they had the land surveyed via survey plan F.R. No. 572/150 in respect of the seven (7) parcels of land; that the 1st Respondent received the survey plan on 6th March, 2015 for processing and that the 1st Respondent allocated to the said plots L.R. Nos. 30596-30602 (*the suit properties*).

4. It is the averment of the Applicants that on 7th March, 2018, the 3rd Respondent interfered with their file and purported to seek for the approval of Survey Plan F R No. 608/165; that the said survey plan was received by the 1st Respondent on 23rd November, 2017 and that on the basis of the 3rd Respondent's survey plan, the 1st Respondent proceeded to unilaterally cancel the Applicants' survey plan without following due process.

5. The Applicants averred that the 3rd Respondent did not present to the 1st Respondent a Part Development Plan laying out the shape of the land over which it was seeking a survey plan; that the 3rd Respondent's Letter of Allotment was in respect to a part of L.R. No. 10029/2 and that the land which the 3rd Respondent was originally interested in does not exist.

6. The Applicants finally averred that the actions of the 3rd Respondent as ceded and abated by the 1st and 2nd Respondents, if not quashed, would amount to compulsory acquisition of the suit properties and that the Applicants' rights over the suit properties are being jeopardized by the Respondents.

7. The 1st and 2nd Respondents filed their Replying Affidavit through the Deputy Director of Physical Planning who deponed that the Applicants purported Part Development Plan does not exist in their records; that the purported approved plan does not have an Approved Development Plan number and that the Application should be dismissed.

8. In response to the Application, the 3rd Respondent's Company Secretary deponed that the entire parcel of land claimed by the Applicants has always belonged to the 3rd Respondent; that the 3rd Respondent was issued with a Grant I.R. 17781, L.R. No. 10029 measuring 8,912 acres on 29th September, 1960 and that the 3rd Respondent was directed to surrender the Grant to the government so as to have the land sub-divided into two parcels of land.

9. According to the 3rd Respondent, its land was sub-divided into L.R. No. 10029/1 measuring 6,000 acres and 10029/2 measuring 2,912 acres; that L.R. No. 10029/2 measuring 2,500 acres was allocated to the 3rd Respondent and that the 3rd Respondent was issued with a Lease on the said land on 15th May, 2018.

10. It was deponed that from the second parcel of land being L.R. No. 10029/2, the Government allocated 2,500 acres to the 3rd Defendant by issuing the 3rd Defendant with a Letter of Allotment dated 9th July, 1988.

11. It was the deposition of the 3rd Respondent's Secretary that the 3rd Respondent was issued with a Lease number IR 196109 on 15th May, 2018 as well as a Certificate of Title; that the 1st Applicant was incorporated five (5) years after the Letter of Allotment was issued in its favour and that the 3rd and 4th Applicants do not exist.

12. The 3rd Respondent's Secretary further deponed that it is the Applicants who are acting suspiciously and infringing on the rights of the 3rd Respondent; that the reference numbers in respect to all the Applicants' Letters of Allotment are the same; that the Letters of Allotment referred to in the Director of Surveys' letter are dated 18th October, 2011 and that the Applicants have not produced any correspondences between themselves and the 1st and 2nd Respondents.

13. The 3rd Respondent's Company Secretary finally deponed that the document referred to as the Approved Development Plan does not have the mandatory plan number; that the 1st Applicant was non-existent in 1998 when it was purportedly issued with a Letter of Allotment and that the Notice of Motion dated 14th June, 2018 should be dismissed with costs.

14. In the Further Affidavit, the 4th Applicant's Chairman deponed that their Part Development Plan was approved by the then Commissioner of Lands; that it is the 3rd Respondent's Letter of Allotment that does not have a Part Development Plan and that their Part Development Plan is genuine and should not be expunged from the records.

15. In response to the 3rd Respondent's Affidavit, the 4th Applicant's Chairman deponed that the 3rd Respondent has not attached any correspondence of evidence to show the reasons for which the land was surrendered; that the 3rd Respondent was only allocated a portion of L.R. No. 10029/2 and that the 3rd Respondent did not follow the laid down procedure for the issuance of a Lease for L.R. No. 196109.

16. According to the 4th Applicants Chairman, grant number IR 17781 belonged to the 3rd Respondent up to 19th August, 1978 when it was surrendered back to the government; that the land ceased to belong to the 3rd Respondent upon being surrendered and that the 1st Applicant has been in operation since 1995 while the 3rd Applicant was registered in 1997.

17. It was deponed that the 3rd Respondent was assisted by the 2nd Respondent to deprive the Applicants their land by surveying land using survey plan FR 608/165 to give rise to L.R. No. 31857 on top of an already existing survey plan number FR 572/152 that gave rise to L.R. No. 30596 to 30602 and that the 3rd Respondent presented a Letter of Allotment without an accompanying Part Development Plan.

18. According to the Applicants, the 3rd Respondent presented a fake Letter of Allotment referenced "*Uns. Part Plot of L.R 10029/2*"; that the land that was surveyed was 991 acres whereas the allotment is for 2,500 acres and that the land was allocated to the 3rd Respondent using an Allotment Letter whose offer had lapsed and that the 3rd Respondent used a fake authorization to process a Deed Plan for the suit property.

19. The Applicants' advocate submitted that the Applicants while waiting to be issued with Deed Plans for their respective portions of land, it came to their knowledge that the 3rd Respondent had interfered with their file and had a Lease issued for L.R. No. 31847; that L.R. No. 31847 was surveyed on top of L.R. No. 30596-30602 and that the process that the 3rd Respondent followed in acquiring its title is a nullity.

20. The Applicant's counsel submitted that before any Letter of Allotment is issued, there is a process that needs to be followed; that normally, there must be a sketch map showing the land that the allottee has been given; that this sketch map is called a Part Development Plan (PDP) and that the PDP Reference Number for the Applicant's property is MKS/8/98/10.

21. Counsel submitted that the Ex-parte Applicants were allotted portions of the parcel of land known as L.R. No. 10029/2 vide Letters of Allotment dated 23rd February, 1998, Ref. No. 39711/XXVI (*Uns. Agricultural Plots Nos A, B, C, D, E, F and G*) all located in Mavoko, Machakos County; that the Ex-parte Applicants complied with the terms of the Letter of Allotment, had the properties allotted to them surveyed and that they submitted a Survey Plan which was assigned F.R No. 572/150 and file number Comps. No. 66904 in respect of the 7 parcels of land by the 1st Respondent.

22. The Applicants' counsel submitted that the Ex-parte Applicants have interests in the parcels of land known as L.R. Nos. 30596 to 30602 and that even though the Ex-parte Applicants have not been issued with Title Deeds to the aforesaid portions of land, they are allottees of the suit properties and have an equitable and beneficial interest in the suit properties.

23. It was submitted that sometime in December, 2017 the 1st and 2nd Respondents cancelled the Ex-parte Applicants' Survey Plans so that the 3rd Respondent can be registered as the owner of the aforesaid property; that this was unlawful and irregular and that the Respondents should not be allowed to casually make allegations of fraud and expect to go away with it. Counsel submitted that the court should dismiss the allegations of fraud made by the Respondents.

24. The Applicants' counsel submitted that the 1st and 2nd Respondents' decision to cancel the Ex-parte Applicants survey plans was unlawful and was in breach of the principles of Fair Administrative Action; that **Article 47 of the Constitution provides for the right to a fair hearing which comprises the strict adherence to the principles of natural justice and that the Ex-parte Applicants herein were not given a fair hearing because they were not afforded a chance to state their case before the cancellation of their approved survey plans by the 1st and 2nd Respondents. Counsel relied on the provision of Section 79 (2) of the Land Registration Act, 2012 which provides that:**

“No alteration affecting the title of the proprietor may be made pursuant to sub-section (1) provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.”

25. It was submitted that under Section 33 of the Survey Act, where the 1st Respondent cancels a survey plan, he is required to notify the registered owner, the Surveyor who submitted the survey plan and the Land Registrar; that this did not happen in the instant case and that the decision making process being challenged was flawed and the same should be righted through the grant of Judicial Review orders sought by the Applicants.

26. It was submitted that the 1st Respondent's decision to cancel the Ex-parte Applicants survey plans was unlawful for want of the ninety-day notice which the 1st and 2nd Respondents was statutory bound to give the Ex-parte Applicants. Counsel relied on the decision in *Daniel Nyongesa & 4 others vs. Egerton University College [1992] KLR 623* where Nyarangi J.A stated that:

“In my view the college should have notified the applicants against each by serving a copy of the notice and requiring each to acknowledge receipt by signing a copy thereof. The notice ought to inform the student concerned that he is at liberty to submit a written defence for consideration by the Board or Senate or by indicating that he wishes to be present. Each affected student would later be notified of the date when to appear before the Board or Senate to defend himself. The Secretary to the body hearing a student should make a full note of the particular student.”

27. Counsel also relied on the case of *Onyango Oloo vs. Attorney General [1986-1989] EA 456* where the Court of Appeal expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard.....There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice.....To “consider” is to look at attentively or carefully, to think, hold the opinion....”Consider” implies looking at the whole matters before reaching a conclusion.....A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.....It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately result in substantial loss of liberty leaves the appellants and others guessing about what matters could have persuaded him to decide in the manner he decided.....In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charges or accusations against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter and offer whatever mitigation he considers fit to put forward, may take the decision in the absence on the person affected. The extent to which the rules apply depends on the particular nature of the proceedings....it is not to be implied that the rules of natural justice to the degree indicated.....courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interest of the executive and the citizens. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides and is seen to be fair.....Denial of the right to be heard renders any decision made null and void ab initio.”

28. It was submitted that the court should quash the 1st Respondent's decision to cancel the Ex-parte Applicants' approved survey plan on the basis that the 1st Respondents failed to accord the Applicants a chance to be heard before reaching that decision; that the cancellation was against reasonable and legitimate expectation and that the 1st and 2nd Respondents' decision to cancel the Ex-parte Applicants approved plans was in breach of the reasonable and legitimate expectation which the Ex-parte Applicants had.

29. **The 1st and 2nd Respondent's advocate submitted that the** Allotment Letters and Survey Plans referred to by the Applicants are fraudulent and duplicitous; that the Part Development Plans attached to the Letters of Allotment referred to by the Applicants were not approved by the relevant office and that although the Applicants filed a Supplementary Affidavit annexing letters from the Director of Physical Planning which purported to show that the Part Development Plans were in order, the said letter did not indicate the approval number and the date of approval of the disputed Part Development Plans.

30. Counsel submitted that the Director of Physical Planning who is purported to have signed the said letter did not depone an Affidavit contradicting Mr. Timothy Mwangi's averments; that it was the onus of the Applicant to adduce evidence of an approval number and that the Commissioner of Lands could not legally alienate government land without an approved Part Development Plan having been drawn and approved by the Department of Physical Planning. Counsel relied on the case of *Nelson Kazungu Chai & 9 Others vs. Pwani University [2014] eKLR* where this court held as follows:

"...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

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

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

132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed..."

31. It was submitted that the suit land had already been alienated to the 3rd Respondent long before the Applicants' purported allocation and that under Section 24(a) of the Land Registration Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging thereto.

32. The 1st and 2nd Respondents' advocate submitted that the issues raised in the Notice of Motion are centered around a claim of ownership of land disguised as a Judicial Review; that Judicial Review is not a proper forum to determine issues touching on ownership of land since there are material facts disputed by all parties herein and that the proper mode of action would have been for the Applicants to institute a civil suit where a final resolution of the disputed Letters of Allotment or Title issued to the 3rd Respondent would be made as it would enable the parties to call witnesses and adduce evidence.

33. Counsel relied on the case of *Sanghani Investment Limited vs. Officer in Charge Nairobi Remand & Allocation Prison [2007] eKLR*, where Wendoh, J. held as follows:

"Be that as it may, I do agree with the Respondents that the underlying dispute herein is ownership of land. Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the Applicant; whether the title is genuine or not. In the case of Rep vs. Ex-Parte Karia Misc. Application 534/03, Justice Nyamu, Justice Ibrahim and Justice Makhandia held that in cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land, namely occupation, and disposition, there would be need to allow viva voce evidence and cross examination of witnesses which is not available in Judicial Review proceedings. Even if the Respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced."

34. Counsel submitted that the suit property was meant for public use but was illegally and irregularly allocated; that the grant of the orders sought by the Applicant herein would be to confirm that the Letters of Allotment are valid which may not be the case and that the Applicants have made their Application in bad faith and its sole motive is to deprive the general public the use of the suit property, and in particular the 3rd Respondent.

35. The 1st and 2nd Respondents submitted that according to Section 32 of the Survey Act, land is only deemed to have been surveyed when the survey plan is authenticated by the signature of the Director of Survey or by the affixing of the seal of the Survey of Kenya; that at Section 33, the Director of Survey has power to cancel authentication of a plan even where reference to such a plan has been made and that in this particular case, the survey plans by the Applicants were not cancelled.

36. It was submitted that although the Applicants allege that there was cancellation of their survey plan, the decision has not been attached to the Application and the specific date on which the cancellation is purported to have been done has not been specified and that for an order of certiorari to issue, there must be an existing decision which is capable of being quashed.

37. The 3rd Respondent's counsel submitted that the 3rd Respondent has established that the suit property was part of its property known as L.R. No. 10029 (*Original Number 7274 and Crown Land*) and measuring approximately eight thousand nine hundred and twelve (8,912) acres that was granted to it on 29th September, 1960 vide Grant Number I.R. 17781.

38. Counsel submitted that the said land was surrendered by the 3rd Respondent on 19th August, 1978 and sub-divided into two (2) parcels of land, viz L.R. No. 10029/1 measuring 6,000 acres and L.R. No. 10029/2 measuring 2,912 acres and that the Ministry of Livestock Development petitioned the Government of Kenya, on behalf of the 3rd Defendant, and the Government of Kenya agreed to grant it land to be used as holding ground for cattle.

39. It was submitted that the 3rd Respondent was issued with a Letter of Allotment for approximately 2,500 acres being UNS 'Part' of L.R. No. 10029/2 and that the 3rd Respondent followed the laid down procedure which culminated in issuance of a *Deed Plan* by the 1st Respondent and subsequently a Lease number IR 196109 over one thousand (1,000) acres that was remaining on L.R. No. 10029/2.

40. Counsel submitted that Section 33 (1) of the Survey Act, vests in the 1st Respondent the power to cancel an authenticated plan before a document or instrument to which an authenticated plan is attached, or in which reference to such a plan is made, is registered and that the impugned Part Development Plan Reference No MKS/8/98/10 was not genuine.

41. Counsel submitted that having legitimately acquired the rights of a proprietor as lessee of the suit property, those rights cannot be defeated by the Applicants' claim and that Section 26 (1) of the Land Registration Act, 2012 provides that a Certificate of Title issued by the Registrar upon registration 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.

Analysis and findings:

42. The Ex parte Applicants (*the Applicants*) are seeking for an order of certiorari to remove to this court for the purpose of being quashed, the 1st and 2nd Respondents' entire decision delivered on or around December, 2017 purporting to cancel the Applicants' Survey Plan F.R. 572/150; the decision purporting to approve Survey Plan F.R. No. 608/165 and Comps. No. 71183 and L.R. No. 31847 to the 3rd Respondent and the subsequent decision of issuing to the 3rd Respondent with the Deed Plan and the Certificate of Title for L.R. No. 31847.

43. The Applicants are also seeking for an order of mandamus directed at the 1st Respondent requiring it to immediately process and issue Deed Plans in respect of L.R Numbers 30596 - 30602 in favour of the Applicants.

44. The Applicants' case is that they are holders of Letters of Allotment dated 23rd February, 1998, Ref. No. 39711/XXVI in respect of UNS. Agricultural Plots Nos. A, B, C, D, E, F and G, all located in Mavoko; that on 28th November, 2013 or thereabout, they had the said plots surveyed and submitted a Survey Plan F.R. No. 572/150 and Comps. No. 66904 and that the 1st Respondent proceeded to approve the said Survey Plan issued L.R. Nos. 30596-30602 in respect of the said plots.

45. The Applicants deponed that they later learnt that the 3rd Respondent interfered with their file and prepared Survey Plan F.R. No. 608/165 and Comps No. 71183 in place of Survey Plan F.R. No. 572/150 and Comps. No. 66904 and that the 1st Respondent unilaterally and arbitrarily cancelled their Survey Plan without following due process.

46. The 1st and 2nd Respondents' case is that the Part Development Plan Reference No MKS/8/98/10 attached to the Applicants' Letters of Allotment dated 23rd February, 1998, Ref. No. 39711/XXVI does not appear in the records of the Department of Physical Planning, Ministry of Lands and Physical Planning; that the purported plan does not have an approved Part Development Plan Number and that the said plan is therefore not genuine.

47. According to the 1st and 2nd Respondents, the 1st Applicant was registered on 10th June, 2003 – more than five (5) years after the purported Letters of Allotment were issued and that the 3rd Applicant does not appear in the Companies Registry database whether as a Company or business name.

48. The 3rd Respondent's case on the other hand is that the entire parcel of land claimed by the Applicants has always belonged to the 3rd Respondent since 29th September, 1960 when it was issued with a Grant Number I.R. 17781, L.R. No. 10029 (*Original Number 7274 and Crown Land*) and measured approximately eight thousand nine hundred and twelve (8,912) acres.

49. It is the 3rd Respondent's case that the 3rd Respondent, being a State Corporation and therefore operating under the direction of the Government of Kenya, was directed to surrender the said Grant to the Government to enable the Government sub-divide the parcel of land into two (2), one parcel of land measuring 6,000 acres being Land Reference Number 10029/1; and a second parcel of land measuring 2,912 acres being Land Reference Number 10029/2.

50. According to the 3rd Respondent, from the second parcel being Land Reference Number 10029/2, the Government of Kenya allotted 2,500 acres to the 3rd Respondent and that the 3rd Respondent followed the laid down procedure which culminated in issuance of a Deed Plan by the 1st Respondent and subsequently a Lease number IR 196109 over one thousand (1,000) acres that was remaining on L.R. No. 10029/2.

51. It is the 3rd Respondent's case that the Lease was registered on 15th May, 2018 and a Certificate of Title was issued in favour of the 3rd Respondent over the said land and that the 1st Applicant does not exist in law.

52. While the Applicants are accusing the 3rd Respondent of having procured a Lease and title over the suit property fraudulently, the Respondents are equally accusing the Applicants of having procured the Letters of Allotment fraudulently.

53. Although the current suit is a Judicial Review Application, the orders that the Applicants are seeking are in essence to cancel the Lease and the Certificate of Title that the 3rd Respondent is holding on the ground that the same was procured fraudulently and illegally.

54. Indeed, under the provisions of Section 26 (1) of the Land Registration Act, a Certificate of Title can only be cancelled by the court on the ground that the same was procured fraudulently or by misrepresentation or through corrupt means.

55. It is trite that where a party pleads fraud, like what the Applicants have done, then such a party must prove the said allegations. In *Okere vs. Kiiyukia [2007], E.A 304* and *Katende vs. Haridas Company Limited [2008] 2 E.A.*, it was held that in fraud cases, proof of fraud is on a standard higher than on a balance of probability.

56. That being so, can the allegations of fraud raised by the Applicants against the Respondents, and *vice versa*, be addressed by way of a Judicial Review Application?

57. The above question was answered by the court in the case of *Sanghani Investment Limited vs. Officer in Charge Nairobi Remand & Allocation Prison [2007] eKLR*, as follows:

“Be that as it may, I do agree with the Respondents that the underlying dispute herein is ownership of land. Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the Applicant; whether the title is genuine or not. In the case of Rep vs. Ex-Parte Karia Misc. Application 534/03, Justice Nyamu, Justice Ibrahim and Justice Makhandia held that in cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land, namely occupation, and disposition, there would be need to allow viva voce evidence and cross examination of witnesses which is not available in Judicial Review proceedings. Even if the Respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.”

58. Further, in the case of *Republic vs. Land Registrar Kilifi & Another ex-parte Daniel Ricci [2013] eKLR*, this court held as follows:

“...Considering that the material facts of this case are seriously disputed, the Ex parte Applicant, in my view, should file a suit and tender evidence on the legality of the title that he holds. It is only vide a suit and after tendering documentary and viva voce evidence that the court will be able to establish the proprietary or otherwise of the suit property viz-a-viz the Respondents claim that the suit property was reserved for public purpose. The grant of the orders being sought by the Ex-parte Applicant will in effect confirm that the Plaintiff's title is valid, which might not be the case. Indeed, such an order will disentitle the public the usage of the land as a fish landing site before hearing viva voce evidence, thus subverting the public interests to those of an individual. That is unacceptable. The most efficacious way of determining if indeed the Applicants proprietary rights to own the suit property have been infringed upon is by way of a Complaint or Petition...”

59. The position taken by the court in the above quoted decisions is the same position prevailing in this matter. This court cannot, on the basis of documents annexed on the Affidavits, determine conclusively that the title document held by the 3rd Respondent was fraudulently acquired, or that the Letters of Allotment exhibited by the Applicants are forgeries.

60. The Applicants should have challenged the documents in possession of the Respondents by filing a Complaint or a Petition and tender *viva voce* evidence on the required standards. The Applicants cannot seek to have the 3rd Respondent's Title quashed on the ground that they were not given a hearing when the authentic and lawfulness of their own documents are being questioned by the Respondents.

61. Indeed, despite the expanded mandate of a Judicial Review Court, where there are contested documents pertaining to land, and where there are allegations of fraud pertaining to the said documents which requires *viva voce* evidence to be adduced, Judicial Review Application is not the most efficacious mode of resolving such a dispute.

62. On that ground alone, and without delving into the contested documents in respect of the suit property, I find the suit by the Applicants to be incompetent.

63. The Notice of Motion dated 14th June, 2018 is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 6TH DAY OF NOVEMBER, 2020.

O. A. ANGOTE

JUDGE