Gakere v Masoud (Being the Administrator of the Estate of The Late Omar Juma Hamadi) (Environment and Land Appeal E067 of 2024) [2025] KEELC 4568 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4568 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND APPEAL E067 OF 2024

EK MAKORI, J

JUNE 12, 2025

BETWEEN

PETER MARIRA GAKERE ..... APPELLANT

AND

ESHA MASOUD (BEING THE ADMINISTRATOR OF THE ESTATE OF THE LATE OMAR JUMA HAMADI) ..... RESPONDENT

(An appeal from the judgment and decree of the Mpeketoni Senior Resident Magistrate, Hon. P.E. Nabwana, dated October 14, 2024, concerning MCELC NO. E014 OF 2023)

JUDGMENT

1. The appeal concerns a land dispute between the appellant and the respondent regarding a parcel of land designated as Lamu/Lake Kenyatta II/5X8 (hereafter referred to as the 'suit property').
2. The appeal arises from the judgment and/or decree issued by the Mpeketoni Senior Resident Magistrate on October 14, 2024, which ruled in favor of the respondent. The appeal outlines nine grounds, detailed as follows:
    a. The learned trial magistrate erred in law and fact by failing to appreciate that, legally, without prompt compliance with its terms, a Letter of Offer terminates upon the expiry of the timelines prescribed in the offer. Consequently, an offeree who defaults cannot assert any lawful claim based on the offer.
    b. The learned trial magistrate erred in law and fact by failing to recognize that no documentary evidence or record was tendered by the respondent or her witnesses to corroborate that the deceased actually accepted the letter of offer by paying the prerequisite deposit; thus, there is no basis for the respondent's ownership claim.

c. The learned trial magistrate erred in law and fact by failing to appreciate that the deceased defaulted on the terms of the letter of offer extended to him, which clearly and unambiguously stated that a deposit of 10% must be paid to the Settlement Funds Trust within 90 days; failure to do so would result in the offer being cancelled without notice.

d. The learned trial magistrate erred in law and fact by failing to recognize that the respondent did not provide any substantial evidence to prove an illegality, fraud, or irregularity on the part of the appellant sufficient to undermine his ownership as required by law.

e. The learned trial magistrate erred in law and fact by failing to recognize that the appellant complied with the mandatory conditions outlined in the Letter of Offer, particularly by making full payment of the fee due to the Settlement Fund Trustee (SFT) with evidence of payment receipts before his registration and the issuance of the title deed for the suit property.

f. The learned trial magistrate erred in law and fact by asserting that no Offer Cancellation Notice was issued to the deceased when there was no such requirement in the letter of offer itself from which the Respondent's ownership claim arises.

g. The learned trial Magistrate erred in law and fact by failing to appreciate that no evidence was presented by the Respondent or her witnesses to establish that the deceased ever accepted the Letter of Offer in the first place, as required, let alone complying with the mandatory conditions set forth therein.

h. The learned trial magistrate erred in law and fact by failing to recognize that the suit property was originally irregularly and mistakenly registered in favor of the deceased, who had defaulted on the mandatory conditions for the allotment, leading to its cancellation.

i. The learned trial magistrate erred in law and fact by holding that the plaintiff's case succeeded while simultaneously stating in its analysis that there is no evidence the deceased ever paid the required mandatory deposit of 10%, occupied the land, cultivated it, set up a structure, or assumed actual possession of the suit property in any way.

3. The appeal was canvassed through written submissions. I acknowledge the arguments articulated by Mr. Soita on behalf of the appellant and Mr. Oduol for the respondent. Based on the provided materials and submissions, I formulate the following issues for the court's determination: 1. Whether the trial court misapplied the facts and the applicable law relevant to the issues presented before it; 2. Whether the appeal has merit; and 3. What reliefs are available to the parties?

4. The appellate court holds a vital position at this stage, tasked with reevaluating the evidence and forming its independent conclusions. In the pivotal case of Okeno v Republic [1972] EA 32 at 36, the East African Court of Appeal outlined the duties of the Court during an initial appeal as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the

trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

5. According to the record of appeal, the deceased, Omar Juma Hamadi, was issued a letter of allotment dated January 31, 1997. Among the conditions that the deceased was required to fulfill, as outlined in the letter of offer on page 51 of the record of appeal, was to pay a 10% deposit within 90 days; failure to do so would result in the cancellation of the letter of offer without any prior notice to him. The deceased complied with this condition by paying the 10% deposit, as corroborated by the letter dated March 7, 2003, found on page 52 of the record of appeal. In this correspondence, the stated grounds for the breach include the deceased's neglect of the plot, failing to construct any shelter or cultivate any trees or crops on it. Notably, the payment of the 10% deposit is not listed as a reason by the Land Adjudication and Settlement Department. Consequently, the conditions stipulated in the letter of allotment, including the payment of the premium, were duly fulfilled by the deceased.

6. The letter of allotment acts as an offer, issued pending the fulfillment of the specified conditions. The deceased successfully met the condition attached to the offer letter issued to him.

7. Conversely, on January 5, 2012, the appellant received a letter of offer regarding the suit property from the Lamu District Land Adjudication and Settlement Officer, which offer he accepted through an acceptance letter dated February 1, 2012. Subsequently, the appellant complied with the necessary conditions outlined in the letter of offer, particularly by making full payment of the fee owed to the Settlement Fund Trustee (SFT), as demonstrated by the payment receipt dated February 1, 2012, for a total amount of Kshs. 39,810. The SFT then discharged the subject property on August 14, 2012, having ensured that the appellant had met the conditions of allotment, resulting in the completion of a transfer in favor of the appellant. The Lamu Land Registrar then issued the appellant a certificate of title.

8. The respondent instituted the suit before the trial court in her capacity as the widow and legal representative of the estate of one Omar Juma Hamadi (deceased), claiming a proprietary interest in the property. She asserted that, prior to the reallocation of the subject property to the appellant, the Lamu District Land Adjudication and Settlement Officer had initially issued an allotment letter to her deceased husband on January 31, 1997. Furthermore, it was noted that the deceased had paid a 10% deposit on the plot to the Settlement Fund Trustee and was ultimately registered and issued a Title Deed with respect to the suit property on August 28, 2006.

9. The appellant argues that the respondent never provided copies of payment receipts, discharge of charge, or transfer forms to support this claim, nor was the Title Deed allegedly issued to the 1st defendant's deceased husband submitted as evidence. The appellant now intends to challenge the trial court's decision, which determined that the respondent's deceased husband obtained an unimpeachable title to the suit property, based on the grounds outlined in the Memorandum of Appeal.

10. Based on the evidence presented to the trial magistrate, two conflicting ownership claims regarding the suit property arise from the conditions and procedures established under the SFT program. These two opposing ownership claims constitute the fundamental basis for evaluating whether the trial court erred in its determination that the respondent possessed a superior title compared to that of the appellant, which this appeal will examine in its final assessment.

11. It is undisputed that the deceased was offered the suit property through the letter of offer dated January 31, 1997, made a 10% deposit, and was subsequently issued a title deed on August 28, 2006. Conversely, the appellant received a letter of offer for the suit property from the Lamu District Land Adjudication

and Settlement Officer on January 5, 2012. He fulfilled all necessary conditions and was subsequently issued a discharge of charge on August 14, 2012, along with a title document on September 10, 2012.

12. Concerning the applicability of an allotment letter in establishing a valid title, I align myself with the conclusions expressed by both counsels, citing the Supreme Court case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (September 22, 2023) (Judgment), which asserts:

> " So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein."

13. 2. In the same decision, the Apex Court proceeded to state:

> " Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include, but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter."

14. Following the payment of the deposit, the deceased was officially registered as the owner of the subject property. This is supported by the Certificate of Official Search dated March 14, 2012, located on Page 18 of the record of appeal, indicating that the deceased was registered as the absolute owner of the subject property on August 28, 2006, with the title issued on that same date. I concur with the respondent's submissions that it is not the letter of allotment that conferred title to the deceased, but rather the act of registration. The deceased made the necessary 10% deposit to the SFT and was subsequently registered as the absolute owner of the subject property.

15. The essence of the appellant's appeal is that the letter of offer concerning the deceased was rescinded by the Director of Land Adjudication and Settlement, as indicated in a correspondence dated July 19, 2003, located on page 53 of the record of appeal. Furthermore, it is asserted that prior to the issuance of the cancellation letter, the deceased received a Notice to Remedy Breach of Conditions dated March 7, 2003, also found on page 52 of the record of appeal. At this juncture, an important question arises: Did the cancellation adhere to the standards of fair administrative action?

16. The procedure for executing this cancellation is outlined in the decision cited by the respondent, specifically in the case of Kimechwa v County Land Adjudication & Settlement Officer, Trans Nzoia & 3 others; Simeon (Interested Party) (Environment & Land Petition E002 of 2023) [2025] KEELC 1042 (KLR) (March 5, 2025) (Judgment), which states that:

> " In my considered view, they are constitutional questions or issues raised that require the court to consider if the acts of omission and commission by the 1st - 3rd respondents in cancelling and reallocating the land met the constitutional threshold of fair administrative action and the right to prevention of deprivation of land otherwise than in accordance with the law under Articles 40(3) and 47 of *the Constitution*."

17. I concur with and align myself with the decisions quoted by the respondent - Kimechwa v County Land Adjudication & Settlement Officer, Trans Nzoia & 3 others; Simeon (Interested

Party) (Environment & Land Petition E002 of 2023) [2025] KEELC 1042 (KLR) (March 5, 2025) (Judgment), M'Mugwika (Suing as the Administrator of the Estate of the Late M'Mugwika M'Ruguongo - Deceased) v Settlement Fund Trustee & another (Environment and Land Appeal 42 of 2019) [2022] KEELC 902 (KLR) (March 9, 2022) (Judgment), and Arthur Matere Otieno v Dorina Matsanza [2003] KEHC 986 (KLR). The Superior Courts have determined that the authority to repossess or forfeit land under the SFT Programme exclusively resides with the Control Land Board. Consequently, in the absence of the necessary minutes, notices of repossession, and approval for forfeiture and reallocation by the Board, such actions are rendered null and void. In the latter case, the court asserted that:

> " From the evidence adduced herein especially the correspondences in the plot file the notice was not served on the proprietor as no officer said that the notice was served on the proprietor who was allegedly overseas. It was pinned on a tree. The condition does not say that substituted service is appropriate.
>
> In fact, the correspondences show that even after the notice was served by pinning the same on a tree, efforts were being made to trace the defendant. There is no correspondent from the field officers concerned to show that they ever traced her and then formally called upon her to remedy the breach.
>
> From the correspondences there is no mention that the case was ever forwarded to the Central Land Board for deliberation and a decision of the Control Land Board passed confirmed by minutes to the effect that the land be repossessed.
>
> According to the instructions from the allotment form, the right to repossess or forfeit land was the preserve of the Central Land Board. Here in no minutes and no instructions have been exhibited to show that the Central Land Board had notice and approved of the forfeiture of that land reallocation of the same. Neither is there evidence to show that those who took the said action were acting on behalf of the Central Land Board. In the absence of proof that action was taken by the Central Land Board or anybody on their behalf the right to forfeit the said land cannot hold."

18. A review of the record of appeal and the judgment rendered by the trial court acknowledges this aspect, concluding that it is evident that no minutes were provided regarding the decision to repossess the land. Moreover, there is no evidence indicating that the deceased was ever served with either the notice to remedy the breach or the cancellation notice. The trial court was cognizant of this issue, which accounts for its well-reasoned determination articulated in Paragraph 11 of its judgment located on page 122 of the record of appeal. The trial court appropriately noted that:

> " Once again, there is no mention nor any evidence even on a preponderance of doubt that a siting was held to discuss the failure of the deceased not to pay for the SFT dues. This should have been a decision by the board with minutes showing the reasons why they have made such a decision."

19. The absence of records indicating that the Central Land Board convened and decided to repossess the land belonging to the deceased demonstrates that the cancellation notice is both unlawful and irregular. The two letters, which include the repossession notice, were issued by the Settlement Fund Trustees, who do not have the authority to repossess land, as this power is solely granted to the Central Land Board. The only recourse available to the Settlement Fund Trustees was to file a civil suit for debt

recovery instead of proceeding with the repossession of the suit property. In the Arthur Matere Otieno Case (supra), the Superior Court ruled on this point in this manner:

> " The letter of re-possession stated that the instructions to repossess had come from the Settlement Fund Trustees, but no such instructions were exhibited or found in the plot file. Further this Court has found that in law as set out elsewhere in this judgment the Settlement Fund Trustees has no power to repossess land they have assisted to finance. The only remedy available to the fund in the event of default of repayment is an action through civil debt collection procedure. There is no right of repossession."

20. Having established in the preceding paragraphs that only the Central Land Board possesses the authority to repossess land under the SFT program and that the Central Land Board did not convene or pass a resolution through minutes to repossess the land; furthermore, the repossession and cancellation of land were executed by the SFT, which lacks such powers, it follows that the decision of the esteemed trial magistrate is sound and justified.

21. At the trial court, no evidence was presented indicating that the Notice to Remedy the Breach and the Cancellation Notice were ever personally served on the deceased. Upon analyzing the evidence on record, the trial court, as stated in paragraph 10 of the judgment on page 122 of the record of appeal, concluded that:

> " This court has said enough to exhibit that no notice was served upon the deceased if at all and it so found."

22. Additionally, the defense witness, DW2, who oversees land adjudication in Lamu County, acknowledged during cross-examination on page 143 of the record of appeal that he had no evidence showing that the Notice to Remedy Breach and the Cancellation Notice had ever been served to the deceased. The witness stated:

> " I don't have evidence that Omar Juma Hamadi had been served the notice."

23. The respondent submitted a certificate of official search dated March 14, 2012, which indicates that as of August 28, 2006, the deceased had been properly registered and issued a certificate of title pertaining to the subject property. The trial court concluded that SFT lacked the authority to cancel a certificate of title, a power that is solely vested in the Court. I am persuaded by the case of Republic v Land Registrar Murang'a & another; Kamonye (Exparte Applicant) (Judicial Review E001 of 2023) [2024] KEELC 4892 (KLR) (June 19, 2024) (Judgment), as aptly referenced by the respondents, wherein the Court held that:

> " It is evident that the power to cancel certificate of title is only vested to the Courts and the Land Registrar has no power to revoke and/ or cancel the title deed, as the Land Registrar can only rectify the same as provided by Section 79 of *Land Registration Act*. In the case of Republic v Land Registrar-Mombasa & 3 others Ex-parte Alladina Properties Limited [2018] eKLR, the Court held as follows:
>
> "The power to rectify the register of titles for reason of fraud or mistake is the preserve of the Court under section 143 of the Registered *Land Act*..."

24. In light of the aforementioned, the SFT did not possess a legitimate title to convey the suit property to the appellant in this matter. The claim made by the SFT to allocate the land to the appellant, asserting that it had reverted to their authority, stands in contradiction to the principle of Nemo dat

quod non habet, which translates to "no one can give what they do not have." This principle indicates that acquiring possession from an entity lacking ownership rights does not establish ownership title for the purchaser. Therefore, it is not feasible for one to attain valid land ownership rights from an individual who lacked a legitimate title initially. This situation is pertinent to the appellant in this case, who obtained land from a party without the legitimate authority to sell or allocate. Consequently, the SFT was unable to confer a valid title upon the appellant. Refer to Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment).

25. Additionally, the Supreme Court, in the case of Harcharan Singh Sehmi & Another Tarabana Company Limited & 5 Others (Petition No E033 of 2023) [2025] KESC (11 April 2025) (Judgment), determined that:

> " Since the holder of an illegally allocated title cannot confer a valid title upon a third party, there would be no "legal estate" to be purchased in the first place. So that if the title in question is illegal or obtained through unlawful means, the purchaser cannot claim protection even if he was not aware of the illegality."

26. Upon examining the matter from an alternative perspective, I concur with the findings of the trial court. If the doctrine of 'first in time' is applicable, it is evident that the respondent was the first to be registered as the absolute owner of the disputed property. This principle has found favour and has been affirmed by the ELC, for instance, in the case of M'Mugwika (Suing as the Administrator of the Estate of the Late M'Mugwika M'Ruguongo - Deceased) v Settlement Fund Trustee & another (Environment and Land Appeal 42 of 2019) [2022] KEELC 902 (KLR) (9 March 2022) (Judgment), where it was held that:

> " In my view, the 1st respondent had no power to allot the same property twice without following the procedure of repossession and forfeiture. The land was alienated already. The first in time prevails. The 1st charge by the appellant had not been withdrawn or recalled or cancelled."

27. Furthermore, in the same case, the court determined that due to the unlawful and irregular nature of the repossession, the second allotment letter issued to the appellant did not attach in rem to any land. The Court stated that:

> " In my view, the second allotment letter/charge to the 2nd respondent did not attach in rem to any land since there was no parcel of land repossessed and or forfeited which the charge could attach."

28. In a nutshell, I do not find merit in the present appeal. It is dismissed with costs to the respondent here and in the lower court.

DATED, SIGNED, AND DELIVERED ELECTRONICALLY IN MALINDI ON THIS 12TH DAY OF JUNE, 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Murimi for the Respondent

Happy: Court Assistant

In the Absence of:

Mr. Soita for the Appellant