

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT HOMABAY**  
**ENVIRONMENT AND LAND COURT LAND APPEAL NO.**  
**E001 OF 2024**

**THE CHURCH TRUSTEES OF THE VOICE OF SALVATION  
AND HEALING CHURCH INTERNATIONAL.....  
.....APPELANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF  
HOMABAY.....RESPONDENT**

*(Being an appeal from the judgement and decree of  
Hon. Nicodemus N. Moseki (PM) delivered in Mbita  
PMELCC No. 13 of 2018 delivered on the 6<sup>th</sup> day of  
December 2023)*

**JUDGEMENT**

**1.** By way of a Further Amended Plaintiff dated 31<sup>st</sup> August 2020,  
the Plaintiffs sought the following orders in the trial court;

**1)An order of declaration that Land Parcel No.  
Lambwe West 'B 2245 is not part of Land Parcel No.  
Lambwe West 1389 and therefore the act of  
creating plot Nos. 32, 33, 56 and 58 on Land Parcel  
No. Lambwe West 'B 2245 amounts to actionable  
trespass to land.**

- 2) General and Aggravated damages to be paid by the defendant jointly and or severally together with interest thereon at the rate of 12% p.a from the date of judgment until payment in full.**
  
- 3) An order directing the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants to vacate any portion of the suit land issue.**
  
- 4) Costs of this suit together with interest thereon as provided by section 27(2) of the Civil Procedure Act.**
  
- 5) An order of eviction to issue against each and every defendant from land parcel number Lambwe West B/2245.**
  
- 6) An order of permanent injunction restraining the defendants jointly and severally and through their servants, agents and or any other person working under their instructions from trespassing, encroaching and or invading the suit land number Lambwe West B/2245.**
  
- 7) Costs of the suit**
  
- 8) Any other relief this Honourable Court may deem fit and reasonable.**

- 2.** The Plaintiffs pleaded that they are the registered owners of Lambwe West B /2245 situate at Lambwe valley settlement scheme, Suba sub county Homa Bay county where they built their church and have been worshipping since 1993 to date. Further, that sometime in the year 2018 the defendants invaded the church land and began doing developments on the suit land displacing the church and making it difficult for church members to worship in the church compound.
- 3.** They averred that the 1<sup>st</sup> defendant put up temporary structures for rental purposes, the 2<sup>nd</sup> defendant was putting up his home on the suit land, the 3<sup>rd</sup> defendant was drilling a borehole on the suit land and the 4<sup>th</sup> defendant had also trespassed onto the land. They prayed for the suit to be allowed.
- 4.** The defendants filed a statement of defence dated 4<sup>th</sup> June 2018 where she denied the allegations in the plaint. She averred that she is only in occupation of a commercial plot at Ogongo market being plot No.32 which was transferred to her by Nashon Osiyo Aloka before the defunct Suba County Council which was transformed through transition and devolution to be the County Government of Homa Bay.

Further, that through due process acquired the plot by way of a transfer which was duly executed by the former owner Mr. Nashon Osiyo Aloka on the 9<sup>th</sup> July, 2008 before the Suba County Council vide Committee Minute No. 06/WTPHM/SCC/2007 held on 31<sup>st</sup>, July, 2007 and further Full Council Meeting on 2<sup>nd</sup> December, 2008 vide Minute No. 07/FC/SCC/2008.

**5.** She averred that she paid for the prescribed allotment/transfer charges to the Suba County Council and has maintained the payment of plot rents as required. Additionally, that the said plot No. 32 at Ogongo Market was demarcated, surveyed and beacons by the then Suba County Council and she has not extended into other adjacent plots owned by other individuals. She maintained that she has been in occupation of the said plot for a period of Nine years (9 years) and the same has not been forfeited by the County Government of Homa Bay.

**6.** The defendants also filed a Counterclaim dated 26<sup>th</sup> April 2019 seeking the following orders;

**a) A declaration that Land Parcel No. Lambwe West 'B/2245 was legally allocated to the counter**

**claimants vide plot No's 32, 33, 56 and 58 A by the county council of Suba.**

- b) A permanent order of injunction restraining the plaintiffs/defendants to counter claim from entering, erecting buildings and/or interfering with the land parcel No. Lambwe West "B"/2245 however and whatsoever.**
- c) General damages for fraudulent registration and occupation of land No. Lambwe West "B" 2245 by erecting a semi-permanent building thereon.**
- d) Cost of the suit and interest.**
- e) Any other relief the honourable court deems fit to grant**

**7.** The matter then proceeded to full hearing. The Plaintiff called 2 witnesses whereas the defendant called 4 witnesses.

**8. PW1** was **Pastor Peter Obiero** who stated that he began preaching at Ogongo in 1993 and persuaded the Chief and the Village elders to give them a place to preach. The chief spoke with his people and we were allocated some land adjacent to SDA Church. He stated that on 2<sup>nd</sup> November 2009 he was informed that one Rael Opole had built on the

land and he went and reported the same to a person in charge of Ogongo Church. On 1<sup>st</sup> April 2018, he heard that some people have invaded the land and build which he again reported. He also personally went there and found a house having been built. He stated that it was built by Titus (2<sup>nd</sup> Defendant).

- 9.** It was his testimony that they went and reported it to the Bishop of Voice of Salvation and Healing international who gave the green light to sue. He produced a search of L.R. No. Lambwe East B/2245 and stated that the church is registered under the registration of names. The copy of registration was marked as Pexh 1. He produced a Certificate of search marked as Pexh 2. He stated that a letter of complaint was written to county coordinator and the same was marked as PMFI 3.
- 10.** During cross examination, he stated that the church began assembling at Ogongo in 1993 and they were given the land by the chief. The land was public land. He stated that he did not know the procedure of allocation of land by the government or whether an application for allocation was made to the ministry of lands. The certificate of registration

shows that it was issued on 3<sup>rd</sup> April 2012 and he did not have a letter of allotment from the county or the farmer South Nyanza County Council. He denied that the land was acquired fraudulently.

**11. PW2** was **Sila Oyugi Omugo**, a pastor of Voice of Salvation and Healing Church in Suba North and South. He urged that the church is situated at Ogongo area in Lambwe West B/2245 and that it started in 1993 before the church was not registered. He urged that the defendants have trespassed on their land. He further stated that they began conducting church sessions at Ogongo Primary School and the residents were inconvenienced with the noises from worshipping and they advised them to see the then chief Samuel Owino to give them land that was set aside for churches. The land was public land which was earmarked for public activities. He produced the PDP map and stated that the owner of L.R, No. Lambwe West LB72245 is South Nyanza County Council. They were holding the land in trust for the church.

**12.** The witness stated that they tried to acquire title documents for the land registry and it was approved but the case was filed in court. They wrote several letters to various

authorities but Rael declined to move out of the land. The other defendants invaded the land 9 years after Rael has invaded it and did not show documents of ownership.

**13.** In 2018 they had changed the system of governance and the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants were to be given allocation documents from the County Government. They were not served any document from the county government for rates. He produced the P.D.P map as PMFI 8 and stated that they have never been served with any notice to vacate the land. He prayed that the suit be allowed.

**14.** During cross examination he stated that the church began in 1993 but was registered in 2012. That the land was given to them by chief and village elders. He stated that the land for churches was reserved by the villagers. He also stated that he had not produced a plot card number as an exhibit and he did not have receipts for land rent and rates. PW3 was Samuel Athuoli the secretary at the Voice of Salvation International Church. He stated that he had a green card of the property ; LR. No. Lambwe West 'B' 2245 which shows that the property was reserved for Ogongo Voice of Salvation & Healing Church and that the proprietor is of South Nyanza

County Council. They did a search of L.R Lambwe west 'B' 2245. It was reserved for Voice of Salvation and Healing Church. The Certificate of search was produced as Pexh 2. He prayed that the land be returned to the church.

**15.** During cross examination, he stated that the land was allocated to them by the chief the village where the church is built for 30 years. He conceded that reservation and allocation are different. He stated that he did not have minutes of allocation by South Nyanza County Council. She stated that she had not seen an agreement between the 1<sup>st</sup> defendant and Nahashon or a receipt of payment of rates by the 1<sup>st</sup> defendant to the South Nyanza County Council.

**16.** The prosecution closed its case and the defence called 4 witnesses in support of its case.

**17. DW1** was **Rachel Ouma Were**. She testified that parcel no. Lambwe West B/32 was issued to Nahashon Otieno Aluga. She produced a bundle of documents to be adopted as her evidence. She adopted her witness statement as evidence in chief.

**18.** During cross examination, she stated that it is Nahashon who applied to the County and that he gave her the plot. That he

did not sell it and she did not know whether Ogongo market land's plot are registered. I have never received any communication from the County government. She did not see any letter written from the Adjudication office and any letter from the Land registrar. She stated that she I received a letter dated 2<sup>nd</sup> June 2010 inviting her to attend a meeting of the Surveyor. She saw the letter from the land surveyor to the effect that land belongs to the church. She also saw a letter dated 8<sup>th</sup> March 2017 and she was told to move from the land.

**19. DW2** was **Isaiah Obongo** who testified that he was given a plot by the council, plot no. 58A which he had applied for. He adopted his witness statement as evidence in chief.

**20.** During cross examination he stated that he had never received any notice from the county government to vacate the plot.

**21. DW3** was **Kennedy Akech Owino** who testified that he was given a plot the same being plot No.56. That he was given the plot on May 2011 after he had applied, and was shown a physical plan of the area. He adopted his witness statement as evidence in chief.

**22.** During cross examination, he stated that he got the plot from the County Government and has never received any notice to vacate from the plot.

**23. DW4** was **Ayub Mandela** who testified that his father acquired plot no. 33 at Ogongo market after he had applied. He adopted his witness statement as evidence in chief and produced his documents as evidence. During cross examination, he stated that he was not privy of any letter of notice to vacate the plot.

**24.** The defence closed its case and parties were directed to file submissions. Upon considering the testimonies of the witnesses and the evidence tendered in court, the trial court entered judgment in the following terms;

**1) The plaintiff's suit and the defendant's counter claim are dismissed.**

**2) Lambwe West "B"/2245 and other parcels of land that may have been hived from Land Parcel Lambwe West 'B' 1389 be and are hereby reverted back to the then South Nyanza County Council, now (1<sup>st</sup> defendant; Homabay County Government). The County Land Registrar is accordingly ordered to**

**amend the proprietorship section in consonance with this order.**

**3) Each party shall bear their own costs.**

**25.** Being dissatisfied with the decision of the trial court, the appellant instituted the present appeal vide a memorandum of appeal dated 15<sup>th</sup> January 2024 premised on the following grounds.

**1) The Learned trial Magistrate misdirected himself on several matters of law and fact.**

**2) The Learned trial Magistrate erred in law of procedure and practice in entering judgment in favour of the respondent (1<sup>st</sup> defendant) who neither filed appearance nor filed a defence to controvert the appellant's claim.**

**3) The Learned trial Magistrate erred in Land Law as provided in the Land Act and the and Registration Act In that -**

**a) The Learned trial Magistrate erred in fact in holding that Land Parcel No. Lambwe West 'B' 2245 was hived out of Land Parcel No. Lambwe West 'B' 1389 whereas both parcels of land are public land**

registered in the name of the then South Nyanza County Council but “Reserved for Ogongo Voice of Salvation and Healing Church” and “Reserved for Ogongo Market” respectively.

b) The Learned trial Magistrate failed to realize that all other surrounding parcels of land, to wit,

i) Land Parcel No. Lambwe West ‘B’ 1393 reserved for A.C.K. church

ii) Land Parcel No. Lambwe West ‘B’ 1392 reserved for S.D.A church

iii) Land Parcel No. Lambwe West ‘B’ 2246 reserved for A.I.C church

iv) Land Parcel No. Lambwe West ‘B’ 1390 reserved for Ogongo Health Centre being public land are operational and are all contiguous to Land Parcel No. Lambwe West ‘B’ 1389 and are not hived out of it.

c) The Learned trial Magistrate made an order of rectification of the register for Land Parcel No. Lambwe West ‘B’ 2245 which was prima facie the property of Ogongo Voice of Salvation and Healing

**Church International as stated in Section 26 (1) of the Land Registration Act 2012, whereas there was no evidence adduced showing that the registration was obtained fraudulently, unlawfully or corruptly as stated in the same section.**

**d) The Learned trial Magistrate ignored all the available documentary evidence from the Land Adjudication Officer, the National Land Commission and the County Government between the years 2010 and 2018.**

**4) The Learned trial Magistrate erred in law of evidence in importing into the case matters which were not adduced in evidence by any witness and which does not arise out of the issues joined in the case.**

**5) The Learned trial Magistrate erred in law in deciding the case against the weight of evidence in failing to realize that Surveyor's Report dated the 24<sup>th</sup> October 2019 by Tiberious Ndigwa and Felix Odhiambo Adie are inconclusive and contradictory and conflict with the letter dated 28<sup>th</sup> February**

**2017 by the County Surveyor Mr. Jared A. Abonyo; and that the suit was merely involving the encroachment of a portion of the appellant's land by the respondent who assumed the same to be part of the market.**

**26.** The parties were directed to file submissions on the appeal.

### **Appellants' Submissions**

**27.** Counsel for the appellant submitted that the evidence in totality adduced before the trial court disclosed the following facts;- a) Land parcel No. Lambwe West "B" 72245 is registered in the name of South Nyanza County Council- Reserved for Ogongo Voice of Salvation and Healing Church. b) Land Parcel No. Lambwe West "B" 7 1389 is registered in the name of South Nyanza County Council - Reserved for Ogongo Market.

**28.** He urged that it is therefore imperative and it goes without saying that plots created and allocated for market development could only be established within Land parcel no. Lambwe West "B" 7 1389. Further, that the plots were two distinct parcels and for the magistrate to hold that Land parcel No. Lambwe West "B" 2245 was hived from Land

parcel no. Lambwe West “B” 7 1389 despite the overwhelming evidence on record is unjustifiable.

**29.** Counsel submitted that vide a letter dated 8<sup>th</sup> March 2019 addressed by Homa Bay County Office of the National Land Commission to the 2<sup>nd</sup> respondent Rael Opolo, which letter she admitted on cross examination of hearing received stated partly as follows: “The purpose of this communication is to peacefully organize to remove your structure (S) and vacate the land within a period of ninety (90) days from the date of receipt of this correspondence. Should you fail to act as advised the church shall be at liberty to institute appropriate legal action to ensure you are forcefully evicted from their land.”

**30.** He stated that similar letters were written by the District Land Adjudication and Settlement Officer Suba/Mbita Districts, the County Surveyor or, the Land Administration Officer for Kisii/Nyamira Homa Bay and Migori of the National Land Commission. The respondents who gave evidence were questioned about these letters and most of them acknowledged receipt and at no point did they object to their production.

- 31.** Counsel cited Section 24 of the Land Registration Act and Section 26 (1) of The Land Registration Act, urging that the Appellant produced a certificate of official search in respect of the suit parcel and the respondents failed to tender any evidence to exhibit that the appellant's title was in any way tainted whatsoever whether by fraud or through a corrupt scheme.
- 32.** Counsel submitted that the 2<sup>nd</sup> to 4<sup>th</sup> defendants are merely licensees and not title holders. Further, that the appellant's exhibits at the lower court being Plaintiffs exhibit 3, 4 and 5 receipts whereof the respondents did acknowledge on cross examination, the 1<sup>st</sup> defendant and The National Land Commission duly revoked the licenses that had been issued to the other defendants and the rents/rates received from the licensees by the County Government are only recoverable by the licensees as debts from the Licensor, the County Government and thus are not proof of ownership.
- 33.** Counsel urged that both Land Parcel No. Lambwe West "B" 72245 registered in the name of South Nyanza County Council. Reserved for Ogongo Voice of Salvation and Healing Church International and Land Parcel No. Lambwe West "B"

7 1389 registered in the name of South Nyanza County Council Reserved for Ogongo Market are public lands as defined by article 62(1) of the Constitution of Kenya. He additionally cited Section 2 of the Land Act 2012 and urged that consequently the letters written by the National Land Commission revoking the licenses issued to the defendants are binding and obliges them to vacate the land as ordered.

**34.** Counsel urged that the Appellant proved her case on a balance of probability and the respondent is estopped by section 120 of the Evidence Act from denying the contents of the various letters from the County Government and the National Land Commission which revoked the licenses given to the defendants which were produced and used during the trial without his objection. Therefore Land Parcel No. Lambwe West “B” 72245 being registered and reserved for the plaintiff should remain as it is registered and all the licenses erroneously issued to the other defendants should be ordered to be revoked accordingly.

**35.** On the issue of general damages and aggravated damages, counsel posited that it is evidence that the defendants were notified in the year 2017 to vacate the suit land by the

person who gave them the license but they refused. Trespass to land is actionable per se without proof of damages. The trespass was commenced in the year 2008 by the County Government but by 2017 the County Government revoked the license. The damages against the licensees are from 2017 to date. The instant case involves continued trespass running to over 15 years.

**36.** Counsel urged that a “continuing trespass” is defined in Black’s Law Dictionary as “A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property”. That Land parcel no. Lambwe West “B” 722 45 is registered in the name of South Nyanza County Council which is now the County Government of Homa Bay. Damages for trespass to land lies against the County Government for the period of 9 years between the year 2008 and 2017 where the licenses were erroneously issued to the defendants. However damages for trespass to land lies against the defendants from March 2017 to date 2023 when the County Government had revoked the licenses which is a period of 6 years. The period of trespass is therefore over 15 years.

- 37.** Counsel cited the case of Justus Munyao Kyungu Vs. Robin Stuart McDonald & Another decided on 31<sup>st</sup> July 2019 (2020) eKLR where Justice Mbogo C.G awarded the sum of Kshs. 1, 500, 000/= for a continuing trespass covering a period of 10 years. He stated that in the instant case the trespass commenced in the year 2008 when the licenses were illegally issued to the defendants to build plots on the plaintiffs land to date amounting to 15 years. The rate of inflation in Kenya now stands at 7.5 %. Consequently the appropriate amount of General damages for continued trespass should be at Kshs. 2,500,000/=.
- 38.** Counsel urged that the appellant satisfactorily discharged the burden of proof and prayed that the court allow the appeal.

### **Respondents' submissions**

- 39.** Learned counsel for the respondent placed reliance on article 62(2) of the Constitution and submitted that the appellant did not issue the trial court with any proof of ownership establishing that the suit land belongs to them. In this regard, he placed reliance on the holding in Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 Others

(2015) eKLR. He urged that the County Surveyor in his conclusion stated that both the defendants and the plaintiff agree that they occupied public land. He additionally cited the case of Niaz Mohammed Jan Mohammed vs Commissioner for Lands & 4 Others (1996) eKLR.

**40.** Counsel urged that the appellant relied on sections 24 and 26 of the Land act but he did not have a title. He additionally stated that it was clear from the surveyors report that parcel no. LAMBWE WEST B/2245 was curved out of 1389. He prayed that the court dismiss the appeal.

### **Analysis and Determination**

**41.** This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized in **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR** as follows:

**“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts**

**on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”**

**42.** Additionally, the Court the of Appeal, in the case of **Susan Munyi v Keshar Shiani (2013) eKLR** stated as follows:

**“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions**

**43.** The issues that arise for determination are;

**1) Whether the trial court erred in dismissing both the Appellants’ Claim and the Defendants’ Counterclaim.**

**2) Whether the trial court erred in directing that the parcels hived out of Lambwe West B/1389 revert back to the Respondent**

**44.** Determining the matters sequentially, the first issues goes first.

**Whether the trial court erred in dismissing the Appellants' Claim and the Defendants' Counterclaim**

**45.** The Appellants' claim was premised on the grounds that they were the registered owners of the suit land and further, that the land was given to the m by the chief and the villagers in 1993 since which year they have been in occupation of the same. They further urged that the 2<sup>nd</sup> – 5<sup>th</sup> defendants were irregularly allocated portions of the suit land after it was later registered as 1389. The defendants on their part, urged that they were allocated the plots legally by the County Council of Suba and are therefore the rightful owners of the same. In order to resolve the issue, the County Land Surveyor was directed to visit the land and give a report on the status of the land and he filed a report dated 24<sup>th</sup> October 2019 where he found that the suit land was curved out of parcel no. 1389 and further, that the procedure followed was the cause of the dispute.

**46.** It is trite law that he who alleges must prove. This principle is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:

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

**2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**47.** Sections 109 and 112 of the same Act states:

**109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

**112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**

**48.** In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in **Mumbi M'Nabea vs David M. Wachira [2016]** eKLR held:

**“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.**

**.....The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M’mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:**

**“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”**

**49.** It has long been held that a certificate of title is considered conclusive proof of indefeasible title of land. Section 26 of the Land Registration Act, 2012 provides:

**“26. (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**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of**

**the Registrar, shall be received in evidence in the same manner as the original.”**

**50.** However, given that it is not in dispute that the land in question was public land, it follows that the root of title must be interrogated to establish whether the parties’ claims to ownership were merited. The legal parameters for determining the root of a title were elucidated by the Supreme Court in the case of **Dina Management Limited v County Government of Mombasa & 5 Others (Petition 8 (E010 of 2021) [2023] KESC 30 (KLR)** where the Court cited with approval the case of **Nelson Kazungu Chai & 9 Others v Pwani University [2014] eKLR** thus:

**“...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 unalienated 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.**

**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 v 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...”**

**This process is restated in African Line Transport Co Ltd v Attorney General, Mombasa, HCCC No 276 of 2003[2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.”**

**51.** The Appellants did not produce any evidence that there was a PDP drawn and approved by the Minister of Lands before the allocation. Additionally, there was no letter of allotment produced by the appellants as evidence that they had been offered the property for allotment. Additionally, the defendants on their part, produced receipts for payments of rates and the 4<sup>th</sup> defendant in particular produced an

allotment letter as evidence of ownership or fulfillment of their conditions of the fulfillment. 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. In **Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others HC Civil Case No 182 of 1992; [2008] eKLR**, this principle was stated as follows:

**“It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all”**

52. This position was fortified by the Supreme Court in **Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)**. In the case the Supreme Court held as follows:

***“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. In Dr Joseph NK Arap Ng'ok v Justice Moiyo Ole Keiyua & 4 others CA 60/1997 [unreported]; and in Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:***

***“It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all” [Emphasis added].”***

**53.** It therefore follows that the allotment letters alone were not sufficient proof of proprietorship. In this regard, I am in agreement with the findings of the trial court. I see no reason to interfere with the decision of the trial court on the issue.

**54.** The Supreme Court in **Dina Management Limited v County Government of Mombasa & 5 Others (Supra)** held that:

**“107 (a) ...It has not been disputed that indeed there was no evidence produced of the letter to the Commissioner of Lands seeking allocation of the**

**suit property by the first registered owner, and there was no PDP before the survey was done. We therefore agree with the trial court and the appellate court that the allocation of the suit property to HE Daniel T. Arap Moi was irregular.**

**108. As we have established above, before allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of Funzi Development Ltd & others v County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR the Court of Appeal, which decision this court affirmed, stated that: "...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility**

**of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”**

**55.** There was no evidence tendered that the requisite processes in acquiring the public land were followed and therefore, I am in agreement with the trial court that the allocation to each of them was null and void. I find no reason to interfere with the dismissal of the plaint and the counterclaim.

**56.** In the premises, I uphold the decision to dismiss the plaint and counterclaim.

**Whether the trial court erred in directing that the parcels hived out of Lambwe West B 1389 revert back to the Respondent.**

**57.** I note that the trial court ordered that any parcels that ‘may’ have been hived from parcel no. 1389 revert back to the 1<sup>st</sup> Respondent. It is my considered view that this order is ambiguous, open ended and inconclusive. The use of the word ‘may’ is general as there is no finality as to the parcels that parties would enforce this order against. Having made a finding with regard to the parcels of land which are pleaded to have been hived out of parcel no. 1389, the correct course of action was to find that only 2245 was to be reverted back

to the 1<sup>st</sup> Respondent, but the court did not err in this respect: it only needed to be clearer.

**58.** In the premises, the Appeal succeeds in part to the extent that the relief No. (2) of the judgment of the trial court is set aside and substituted as follows;

**1) Lambwe West B 2245 which was hived off from Lambwe West B/1389 be and is hereby reverted to the 1<sup>st</sup> Respondent.**

**2) The dismissal of the Plaint is upheld and the counterclaim too dismissed with costs.**

**3) Costs of this appeal, even though the appeal succeeded in part, are to the Respondent.**

**Judgment dated, signed and delivered virtually via the Teams Platform this 15<sup>TH</sup> day of December 2025.**

**HON. DR. IUR NYAGAKA**

**JUDGE**

In the presence of,

W. Ojienda for the

Ms. Oyala holding brief for G.S. Okoth the appellants