

**IN THE COURT OF APPEAL
AT ELDORET**

(CORAM: WARSAME, MATIVO & GACHOKA, JJ.A.)

CIVIL APPEAL NO. ELD E076 OF

2020 BETWEEN

**THE BOARD OF TRUSTEES,
NATIONAL SOCIAL SECURITY.....APPELLANT**

AN

D KEIYO TEACHERS CO-

**OPERATIVE
SAVINGS AND CREDIT SOCIETY.....1ST
RESPONDENT ANDREW
OJAL.....2ND RESPONDENT
DISHON OJAL.....3RD
RESPONDENT
HOSEA BETT.....4TH
RESPONDENT
KENNEDY TOMNO.....5TH
RESPONDENT HON. COMMISSIONER OF
PRISONS.....6TH RESPONDENT HON. ATTORNEY
GENERAL.....7TH RESPONDENT**

*(An appeal from the judgement and decree of the
Environment and Land Court of Kenya at Eldoret
(Ombwayo, J.) dated 5th February, 2020 and delivered on
by Kibunja, J on 9th April 2020*

in

ELC Case No. 253 of 2012).

REASONS FOR DECISION

1. On 20th January 2026, we dismissed the appellant's appeal against the judgment and decree rendered by *Ombwayo, J.* on 5th February 2020 and delivered on his behalf by *Kibunja, J.* on

9th April 2020 in Eldoret ELC Case Number 253 of 2012 under Rule 34 (7) of the Court of Appeal Rules, 2022. Pursuant to the said

Rule, these are the reasons for our decision. However, in order to provide context to the reasons, it is necessary for us to briefly highlight the factual background to the litigation before the trial court which culminated in this appeal. Luckily, this history is principally straight forward, common ground or uncontroverted.

2. By a sale agreement dated 25th August 2004, the appellant agreed to sell to the 1st respondent the following parcels of land: (a) Eldoret Municipality Block 10/176 measuring approximately 10.00 Hectares, (b) Eldoret Municipality Block 10/177 measuring approximately 10.00 Hectares; (c) Eldoret Municipality Block 10/178 measuring approximately 10.00 Hectares, and (d) Eldoret municipality Block 10/179 measuring approximately 10.00 Hectares (the suit properties) at an agreed consideration aggregating to Kshs.40,011,880/- for the four parcels which translated to Kshs.12,527,970/- per parcel. The agreed mode of payment was Kshs.10,000,000/- payable upon executing the agreement and the balance of Kshs.40,011,880/- was to be paid within 90 days from the date of executing the agreement. There is no dispute that the 1st respondent fully paid the entire purchase price as per the agreement to the appellant.

3. To facilitate the transfer of ownership of the said properties, the parties signed "*transfer of land*" forms which were presented at

the land's office and duly registered. These transfer instruments were applicable if the title is an "*absolute title*" as opposed to a "*leasehold*". The ownership documents issued by the land's office to the 1st respondent are "*certificates of lease*" for each parcel of land. Here is case where "*the wrong transfer instruments*" were used to effect the transfer. However, this issue was never raised before the trial court or before this Court. We say no more about it, save that it would have been remiss for us not to point it out.

4. Back to the dispute, in its plaint dated 27th April 2006, the 1st respondent sued the 2nd to the 5th respondents before the High Court at Eldoret in HCCC No.56 of 2006 accusing them of invading its aforesaid parcels of land with the intention of ploughing, planting, developing the same for their benefits, obstructing subdivision of the land, chasing them from the suit lands and uprooting their beacons. The plaint was amended several times as follows, on 12th March 2007, which amendment added the 6th and 7th respondents, on 24th March 2009, 23rd September 2010 and the final amended plaint in Court stamped on 21st February 2011. The nub of the 1st respondent's claim is that it lawfully acquired the suit properties. Alternatively, and without prejudice to the foregoing, 1st respondent accused the appellant of fraudulently

selling the suit properties to it or

obtaining its money through misrepresentation. The 1st respondent prayed for judgment against the appellant herein and the 2nd to the 7th respondent jointly and severally as follows:

- a) A declaration that land parcels numbers Eldoret Municipality Block 10/176, Eldoret Municipality Block 10/177, Eldoret Municipality Block 10/178 and Eldoret municipality Block 10/179 belong to the 1st respondent.**
- b) A permanent injunction restraining 2nd, 3rd, 4th and 5th respondents jointly and severally by themselves or their agents from trespassing or in any other manner dealing with the suit properties.**
- c) Special damages (i) Kshs.1,474,500/= and, (ii) Ksh. 15,000/= per year.**
- d) In the alternative a refund of the consideration paid together with all the costs expended by the plaintiffs in effecting the transfer of the said parcels of land.**
- e) Special damages as follows; (i) consideration paid- Kshs.50,111,880/=. (ii) other expenses Kshs. 3,250,000/=.**
- f) General damages.**
- g) Costs of the suit.**
- h) Any other relief the Court deems fit and just to grant.**

5. The suit was subsequently transferred to the Environment and Land Court upon its establishment.

6. In their further amended defense and counter claim dated 18th November 2011, the 2nd to 7th respondents maintained that the suit premises is Government land which had been gazetted

vide Legal Notice Number 37, Prisons Ordinance dated 22nd day of June 1961. Consequently, the said land was not capable of being

alienated for private purpose or use. Further, the 2nd to 6th respondents are civil servants working in the Prisons Department, Ministry of Home affairs at the GK Prison, Eldoret, hence they cannot be sued in their personal capacity for any cause of action accruing while in the cause of their official duties. Consequently, the 1st respondent's suit violates the provisions of Government Proceedings Act.

7. The 2nd to 7th respondents denied that 1st respondent is the registered owner of the parcels of land in question which were purportedly created from prisons land, and if at all the 1st respondent was registered as the proprietor of the suit premises, then such registration was effected without their sanction, and that it is fraudulent and void *ab initio*. Consequently, any transactions arising from the void registration are tainted with fraud and illegality and any party thereto was negligent and failed to exercise diligence to ascertain the true status of the land. They averred that the 1st respondent's acquisition of the suit properties was irregular, un-lawful and was intended to deprive the Prisons Department its duly gazetted prisons land. Further, the appellant's acquisition of the land was the subject of investigations by the Commission of inquiry into illegal/irregular allocation of public land which reported that the appellant's

acquisition of the suit properties was irregular and illegal.

8. The 2nd to 6th respondents averred that the 1st respondent's illegal actions rendered it impossible for them to use the land for its statutory purpose. Therefore, they claimed *mesne* profits at Kshs. 15,000/= per acre per month for the entire period the 1st respondent was in occupation. Further, they denied the allegations of loss, damages and the special damages sought by the 1st respondent in their plaint. They also averred that the suit land was surveyed and reserved for 5th respondent.
9. In the alternative and without prejudice to the foregoing, they averred that if at all the Land Registrar registered titles in favour of the 1st respondent, then the Land Registrar acted knowing that he lacked statutory authority to do so, hence, his actions amount to a misfeasance in public office, therefore, the alleged transferors were beneficiaries of the misfeasance.
10. The 2nd to 6th respondents counter-claimed against the 1st respondent *mesne* profits, full possession of the suit land, a permanent injunction against the 1st respondent restraining it or successors from occupying the suit property, revocation, cancellation and rectification of the register and reversion of the suit land to the 6th respondent's exclusive use and enjoyment.

11. The appellant herein was the 7th defendant before the trial court.

In its defence and counter-claim, it averred that the 1st respondent is the registered owner of the suit properties having acquired the same from the appellant. It further averred that the 1st respondent acquired the said parcels by way of purchase from it for consideration which it duly paid.

12. The appellant admitted that upon purchasing the land, the 1st respondent was legally and procedurally registered as the owner of the said properties and it was duly issued with the certificates of lease. It also admitted that the 1st respondent had been in possession of the suit land since the date of purchase. It averred that the suit properties belong to the 1st respondent who is the registered owner, therefore the 1st respondent is entitled to the orders sought in its plaint, namely, a permanent injunction restraining the 2nd, 3rd, 4th and 5th respondents jointly and severally from trespassing, ploughing, planting, developing or dealing in any way with the suit properties.

13. The appellant vehemently denied the allegations of fraud or that it fraudulently obtained money from the 1st respondent. It maintained that it purchased the suit parcels from the following persons: **(a) Eldoret Municipality Block 10/176 from Michael Terik. (b) Eldoret Municipality Block 10/177 from Manjen Holdings Limited. (c) Eldoret**

Municipality Block 10/178 from

Benjamin Kipchirichir. (d) Eldoret municipality Block 10/179 form Wilson Maina, all of whom were the registered proprietors of leaseholds of 99 years with effect from 1983 issued by the Government of Kenya. Therefore, the appellant was a *bona fide* purchaser for value without any notice. Further, it passed good titles to the 1st respondent. Consequently, the 1st respondent is not entitled to a refund of consideration as claimed or at all together with the costs expended in effecting the transfers from the appellant herein.

14. In the impugned judgment, after considering the evidence, the parties' submissions and the law, the learned judge stated:

"I do find that the suit land was already alienated and had been gazetted prison land and is till Gazetted prison land and therefore all the attempts to convert the same to private land, subdividing, issuing titles, selling were nullities. On the issue as to whether the 7th Defendant obtained good title. I do find that nullities are nullities and no good title could come out of nullities. However, I do find the plaintiffs to be innocent purchaser for value. The plaintiffs innocently purchased the illegally obtained parcel of land which remains public land, the 7th Defendant's board did not approve the purchase by any resolution. This court finds that the plaintiff cannot succeed against the 1st to 6th Defendants and 8th Defendant; however, he succeeds against the 7th defendant for the refund of the purchase price of Ksh.50,111,880/- plus interests at court rates from date of filing suit.

The 1st-6th Defendants succeeds on the counter claim as the parcel of land still remains public land and all transactions on the same are hereby declared nullities.

The plaintiffs are awarded costs against the 7th Defendant while the 1st-6th Defendants are not awarded costs as all the null and void transactions were carried out by the Commissioner of Lands. Orders accordingly. (Emphasis added)

15. Aggrieved by the above decision, the appellant is now before this Court citing a whopping 13 grounds of appeal in its memorandum of appeal dated 30th September 2020, which can safely be summed up into three grounds: (a) whether the suit properties were gazetted public land and un available for alienation for private use;
- (b) whether the order for the refund of the purchase price to the 1st respondent was merited, and, (c) whether the learned judge failed to consider the appellant's submissions.
16. We heard this appeal virtually on 20th January 2026. Learned counsel Ms. Wambani held brief for Mr. Kitiwa for the appellant. Mr. Cheptarus appeared for the 1st respondent. There was no appearance for the 2nd to 7th respondents nor did they file submissions. Upon considering the grounds of appeal, the impugned judgment, the evidence tendered before the trial court, the parties' written submissions and their brief oral highlights, we dismissed this appeal under Rule 34 (7) of the Court of Appeal Rules, 2022 and reserved our reasons for the decision.

17. In support of the appeal, the appellant's counsel maintained that Gazette Notice No.751 dated 18/12/1963 did not specifically state

that the suit lands were part of Eldoret GK Prison. Further, the titles issued in favor of the 1st respondent have never been cancelled. Counsel maintained that the certified true copy of the Land Registrar as at 31/8/1994 showed that the Government was the lessor of the suit land, that the Government leased the parcels of land to the original allottees who then transferred the same to the appellant. It was her submission that the allotment letters that gave rise to the suit lands were issued by the Government just like the title deed issued to the appellant and subsequently to the 1st respondent. To buttress her argument, counsel cited **Joseph N. K. ArapNgok vs. Justice Moiyo Ole Keiuwa & 4 Others, Civil Appl. No.60 of 1996**, in which it was held that:

"It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions of the Act under which the property is held."

18. To further buttress her argument, the appellant's counsel cited this Court's decision in **Wreck Motor Enterprises vs. The Commissioner of Lands & Others [1997]** in support of the holding that title to landed property normally comes into existence after issuance of a letter of allotment. She argued that before the original allottees were allocated the suit lands, they met all the conditions set out in the letters of allotment

and the

Commissioner of Lands who is the custodian of all the land records in Kenya did not mention that, the suit land had already been alienated to the Eldoret GK Prison. Counsel contended that a site visit to the suit lands confirmed that it was not part of the suit properties. It was her contention that the fact that the appellant was allocated land confirms that the suit properties were available and are still available for alienation, and, in any event the allotment letters and the titles were issued by the Government.

19. The appellant's counsel further argued that if the suit properties had been alienated to the Eldoret GK Prison as alleged, then the Commissioner of Lands, who is the custodian of all the land records in Kenya, would not have allocated the parcels to the original allottees. She also contended that the 1st-6th respondents never called the Commissioner of Lands to find out how the suit lands were allotted to the original allottees. She contended that in the unlikely event that the suit lands were alienated to Eldoret GK Prison vide gazette notice number 751 dated 18/12/1963 as alleged, the possibility that Government could have later hived part of the land and allotted it to the original allottees cannot be ruled out and relied on **Town Council of Awendo vs. Nelson Odour Onyango & Others [2013] eKLR** in which the Court of Appeal held that

every land that has been the subject of

compulsory acquisition or alienated can revert to private hands or use if such land is not wholly utilized for the public purpose for which it was acquired.

20. Also, the appellant's counsel faulted the trial court for finding that the 1st respondent was a *bona fide* purchaser for value. To buttress this assertion, counsel cited several authorities which we have carefully considered among them **Katende vs. Haridar & Company Limited [2008] 2 E.A.173** where the Ugandan Court of Appeal described a *bona fide* purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, he must prove that (a) he holds a certificate of title; (b) he purchased the property in good faith; (c) he had no knowledge of the fraud; (d) he purchased for valuable consideration; (e) the vendors had apparent valid title; (f) he purchased without notice of any fraud; (g) he was not party to any fraud.

21. Counsel disputed the assertion that the appellant was involved in collusion or fraud which he argued must strictly be proved as was held in **Davy vs. Garrette [1878] 7 Ch.473 at Pg 489** and cited section 109 of the Evidence Act in support of the proposition that he who asserts must prove. Counsel maintained that the appellant

was a *bona fide* purchaser for value and asserted that the appellant passed a good title to the 1st respondent.

22. Lastly, the appellant's counsel faulted the trial court's finding that there was no board resolution passed by the appellant sanctioning the transaction. She also faulted the trial court for ordering refund of the purchase price to the 1st respondent.

23. In support of the impugned judgment, the 1st respondent's counsel maintained that the trial court rightly arrived at the correct decision that the Commissioner for Lands breached the law because he lacked legal authority to allocate gazetted prison land for private use. He submitted that the purported allottees passed illegal titles to the appellant who in turn sold the suit properties to the 1st respondent at a consideration of Kshs. 12,500,000/- for each parcel of land. Counsel maintained that the appellant acted in collusion with the allottees because they knew or ought to have known that the land was unalienated prison land as defined in sections 2, 3 and 7 of the Government Lands Act and section 3 of the Physical Planning Act, therefore, it was not available for alienation for private use. To fortify the foregoing submission, counsel cited the Supreme Court decision in **Kiluwa Limited & Another vs. Business Liason & 3 Others (Petition No. 14 of 2017)** [2021] KESC 37 (KLR) in support of the

proposition that un-alienated Government land is public land within the context of Article 62 of the Constitution and the Government Lands Act (Repealed), that Article 62 of the Constitution clearly delimits the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of “*public tenure*”. The Court proceeded to state that the retired Constitution used the word “*government*” instead of “*public*” to define such lands. Section 2 of the Government Lands Act which defined “*un-alienated Government Land*” to mean government land which was not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. Government land in this context is land that was held by government ministries, departments, statutory bodies and agencies, and land which has not been registered. Counsel also made reference to the definition in Section 3 of the Physical Planning Act (repealed) which defined un-alienated Government land to mean land which as at the effective date was un-alienated government land as defined by an act of Parliament.

24. The 1st respondent also submitted that the appellant did not approve any resolution sanctioning the purchase of the said properties. Further, the 1st respondent was an innocent

purchaser for value without notice of any defect in the title, therefore, the learned judge correctly allowed the claim for the refund of the purchase price amounting to Kshs.50,118, 880/- plus interests at Court rates from the date of filing the suit and costs of the case.

25. Counsel referred this court to **Dina Management Ltd vs. County Government of Mombasa & 5 Others [2023] KESC 30 (KLR)** in which the Supreme Court held that public land could not be alienated. Counsel also relied on **Torino Enterprises Limited vs. Attorney General [2023] KESC 79 (KLR)** in which the Supreme Court held that an allotment letter is incapable of conferring an interest in land. It was also his submission that the appellant did not join the developers in the proceedings and maintained that the 1st respondent was an innocent purchaser for value.
26. This is a first appeal; therefore, it is by way of retrial. The principles upon which this Court acts in such an appeal are well settled. As was held by this Court in **Attorney General & Another vs. Hussein & 3 Others [2025] 1022 (KLR) (5 June 2025) (Judgment)**, this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this

respect. It is

also settled law that, this Court can only interfere with the trial court's findings of fact if it appears either that the trial judge failed to take into account relevant considerations or has taken into account irrelevant considerations or the findings are not supported by the evidence. (See **Abdul Hameed Saif vs. Ali Mohamed Sholan [1955], 22 E. A. C. A. 270**).

27. As mentioned earlier, upon considering the trial court proceedings, the impugned judgment and the parties' submissions, we dismissed the appeal under Rule 34 (7) of this Court's Rules. Our reasons for dismissing this appeal will be manifest as we address the issues which in our view fall for determination. These are: (a) whether the suit properties were un- alienated public land, and therefore available for allotment to private developers; (b) whether the appellant passed a good title to the 1st respondent; (c) whether the trial court erred in ordering the appellant to refund the purchase price to the 1st respondent; (d) whether the trial court failed to consider the appellant's submissions, and, (e) who should bear the costs of this appeal and the trial court proceedings. We will address the said issues chronologically.

28. As we address the first issue, it is important to mention that the facts which gave rise to these proceedings are either common

ground or uncontested. In essence, if a fact is admitted during the proceedings or in pleadings, it is considered settled, and the Court can rely on it without further evidence. It is not disputed that the 1st respondent bought the suit parcels from the appellant. It is common ground that the 1st respondent paid the agreed consideration in full. The crux of the 2nd to the 6th respondents case is that the suit premises is Government land which had been gazetted vide Legal Notice Number 37, Prisons Ordinance dated 22nd June 1961, therefore, it was not available for alienation for private purpose or use, therefore, the purported alienation was null and void. On the other hand, the appellant maintains that the suit properties were properly allotted by the Government to the original allottees from whom it acquired the properties and sold and transferred the same to the 1st respondent who was issued with valid certificates of lease.

29. After considering the parties pleadings, evidence and submissions, the trial Judge stated:

“I have considered the pleadings, evidence on record and rival submissions and do find that the evidence of Corporal Leonard Oguto, a surveyor in the prisons department is very crucial on the historical background in respect to the land. On the 22.6.1967, the suit land was gazetted as prison land. -- Gazette Notice No. 751 dated 18/12/1963 confirms this land as prisons land. It is law that any land gazetted to belong to the

Government, its departments or agencies is public land and therefore unavailable for

allocation.

The Commissioner of Lands breached the law in allocating gazetted prisons land to private persons. These persons further passed illegally acquired titles to National Social Security Fund who conversely did the same to Keiyo Teachers Cooperative Society. Surprisingly, On the 27th May 1994, even before the allottees were registered proprietors they had already signed agreements with the board of trustees National Social Security Fund for purchase of the suit properties at consideration of ksh.12,500, 000/= each. This implies that there was collusion between the allottees and National Social Security Fund.

It is worth noting that the allottees were in a strange hurry to dispose of the property to National Social Security Fund because they were registered as proprietors on the 31/8/1994 and disposed of the property on the same date thus on the 31/8/1994.

This Court finds that when all this was happening the land was gazetted as prisons land and that the 7th defendant knew or ought to have known and therefore cannot feign ignorance. The land in issue had already been alienated as public land for the use of the department of prisons. According to section 2 of the Government Lands Act (Repealed), the following is the definition of unalienated land: "unalienated Government land" means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment."

Section 3 of the Physical Planning Act, Cap 286 of the Laws of Kenya defines unalienated land in similar fashion. The court of appeal in High Court Civil Appeal No. 288 of 2010, Kipsirgoi Investments Limited vs Kenya Anti-Corruption Commission relied on section 2 of the Government Lands Act and Section 3 of the Physical Planning Act when it found that the suit property was as planned as an open space and

held that the subsequent lease under section 3 of the GLA was irregular as the land was already alienated.”

30. As is evident from the above excerpt, the learned judge cited

decided cases in support of the above findings. He also referred to Section 2 of the Government Lands Act (repealed) and relied on **James Joram Nyaga & Another vs. the Hon. Attorney General & Another [2007] eKLR**, in which the Court in reference to Sections 3 and 7 of the Government Lands Act and stated as follows:

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

31. There is undisputed evidence that the land in question was gazetted as prison land. The appellant argued that the gazette notice did not specifically state that the suit lands were part of the Government prison. With tremendous respect, this argument collapses not on one but on several fronts. One, as the trial court correctly observed, the evidence of Corporal Leonard Oguto, a surveyor in the Prisons Department testified that the suit land was gazetted as prison land vide Gazette Notice No. 751 dated 18/12/1967. This cogent evidence was

not rebutted. Two, the

purported alienation and the transactions which gave rise to these proceedings including the impugned sale were done in 2004, many years after the entire land had been gazetted as prison land. Therefore, to argue that the gazette notice did not specify that the suit parcels were part of the prison land is highly misguided. How could the gazette notice foresee an excision of the land that would take place several decades later?

32. The other argument propounded by the appellant's counsel is that the Government leased the titles to the original allottees who sold the land to the appellant. Counsel argued that the said allotment gave rise to titles which were issued to the original allottees, therefore, the appellant passed a good title to the 1st respondent. The appellant's counsel further argued that before the original allottees were allocated the suit lands, they met all the conditions set out in the letters of allotment and the Commissioner of Lands, who is the custodian of all the land records in Kenya did not mention that, the suit land had already been alienated to the Eldoret GK Prison. Counsel contended that a site visit to the suit land confirmed that it was not part of the suit properties. It was her contention that the fact that the appellant was allocated land confirms that the suit properties were available and are still available for alienation

and in any event the allotment letters and

the titles were issued by the Government.

33. Confronted with the above arguments, the learned judge was categorical that any land gazetted to belong to the Government, its departments or agencies is public land and therefore unavailable for allocation. We agree with the learned judge. We can only add that gazetted public land is not necessarily un- alienated public land. While both gazetted land and un-alienated public land are types of public land as defined under Article 62 of the Constitution, each represents a totally different status regarding its usage and reservation. To start with, un-alienated public land refers to public land that has not been leased, specifically reserved for a public purpose, or allocated to any specific entity. It is generally available for future allocation or development. On the other hand, Gazetted public and refers to land that has been officially designated (gazetted) for a specific public purpose, such as a government forest, game reserve, national park, water catchment area, or land reserved for security or educational facilities or for public use such as prison land. This list is not exhaustive.

34. In **Torino Enterprises Limited vs. Attorney General** (supra) the Supreme Court affirmed that the Commissioner of Lands had no authority to alienate or allocate public land that was already

reserved for a particular public purpose. The Apex Court was categorical that the letters of allotment issued for such lands do not convey any transferable interest in land if the land was already gazetted for public use.

35. **Kiluwa Limited & Another vs. Business Liaison Company Limited & 3 Others** (supra), the Supreme Court emphasized that: (a) the Commissioner of Lands could only lawfully allocate "un-alienated government land; (b) public land reserved for specific purposes (like hospitals, schools, or forests) is not un-alienated land and cannot be allocated to private individuals." (Emphasis added). In **Sanghani Investment Limited vs. The Officer in Charge Nairobi Remand & Allocation Prison [2012] [H.C. Misc. Application No. 99 of 2006]** the High Court found that land reserved for prisons (public land) cannot be allocated for private residential or commercial use.
36. Decided cases are in agreement that once land is gazetted as public land, it falls under a separate category of land that has already been alienated for a specific public use. (See **Mungania & 3 Others vs. County Government of Meru & 6 Others (Petition E010 of 2024) (2025) KEELC 3299 (KLR) (23 April 2025) (Judgment)**). Once land is gazetted for a specific purpose or use, it is reserved for that purpose only and therefore, it is not available

for general, private or alternative use. Public land is gazetted for a particular use enjoys a high level of legal protection, therefore, it is not available for re-alienation or sub-division or allotment. In contrast, un-alienated public land is essentially public land that has not yet been committed for a specific lease or allotment.

37. On the other hand, gazetted land can only be alienated after it is properly de-gazetted. No evidence was tendered to suggest that the suit properties were de-gazetted, a stringent legal process that is designed to protect public interest land from arbitrary allocation to private individuals. The procedure entails consultation with competent authorities, public notice of the intention to de-gazette, environmental impact assessment, cabinet approval, parliamentary approval and finally de-gazettement.

38. Arising from our foregoing discussion, we find no reason to fault the trial court's finding that the suit land was public land gazetted as prison land. Therefore, it was not available for alienation. Further, the purported alienation and the letters of allotment allegedly issued to the third parties who sold the land to the appellant were null and void *ab initio*. Therefore, the purported allottees could not pass good title to the appellant. In the same vein, the appellant had no good title to

pass to the 1st respondent. The above findings have effectively answered the first two issues

listed earlier in the negative.

39. We now turn to the third issue which is, whether the trial court erred in ordering the appellant to refund the purchase price to the 1st respondent. Generally, a refund of purchase price can be ordered if the contract is rendered void, voidable or terminated due to breach by the seller or of the contract fails due to the seller's lack of title. A court can also order refund of purchase price paid on grounds of fraud, misrepresentation or concealment of material facts. (See the Supreme Court of India decision in **Moideenkutty vs. Abraham George [2025] INSC 1428**, a strong precedent against fraudulent suppression of material facts in real estate agreements).
40. The speedy manner in which the land was sold, leaves a lot of questions unanswered including the speedy registration of the transfer instrument, to the extent of using the wrong transfer documents leaves a lot to be desired. To our mind, this is a model example of a fraudulent transaction. A classic, foundational court decision defining a fraudulent transaction (specifically, a fraudulent transfer/sale of land or conveyance) intended to evade scrutiny of the validity of a land title, or a conveyance intended to hide assets from creditors or the eyes of the law is an English decision known as the **Twyne's case 916010, 3 Co Rep 80b, 76**

E.R 809. Today, courts in many jurisdictions still apply the above principles. A recent relevant example is the case of **Wakaimba vs. Registrar & 3 Others, [2025] KEELC 1058** in which the Environment and Land Court affirmed that transactions involving forged documents or, where land was improperly allocated, are fraudulent and null and void, even if the current owner claims to be an innocent purchaser. The core element in such cases is the intent to deceive to gain an unlawful advantage. The appellant as the vendor cannot be said to have been innocent in the acquisition of the land and its disposal to the 1st respondent, consequently, the contract between the appellant and the 1st respondent was void or voidable.

41. Therefore, it is trite law that a court can order refund of a purchase price (or deposit paid) when the sale agreement is rescinded, rendered void or frustrated due to breach of contract by the vendor, or due to supervening impossibility of performance. The courts prioritize restoring parties to their pre-trial contract positions (*restitution in intergrum*) when specific performance is not possible. (See **Kimaru vs. Salim [2025] KEHC 4031 (KLR)**). While the Court will not easily allow a party to escape “a bad bargain”, if a seller has acted in breach or unconsciously (lacking “*clean hands*”), the Court may order

the return of the purchase

price. We believe we have said enough to demonstrate that the trial court acted within the law in the circumstances of this case when it allowed the 1st respondent's plea for refund of the purchase price on grounds that the appellant had no good title to pass to the 1st respondent. In short, the manner in which the appellant acquired the properties is highly questionable.

42. Lastly, the appellant faults the trial court for not considering his submissions. At the outset, we must point out that requiring a court to consider and weigh all the submissions does not mean that the judgment of the Court must include a complete embodiment of all submissions made, as if it comprises a transcript of the proceedings. We have gone through the submissions and evidence tendered before the trial court. We have also read the judgment, the evaluation of the evidence and submissions and the reasons for the decision. In fact, we reproduced the definitive parts of the judgment earlier in this decision. We are satisfied that the learned Judge considered all the material before him. Therefore, we find no merit in the argument that the trial court did not consider the appellant's submissions.

43. Arising from our discussion on the issues addressed herein above and the conclusions arrived at, we find that this appeal is devoid

of merit and dismiss it in its entirety. We affirm the trial court's findings. Regarding costs, it is trite law that costs follow the event. The event here is that the appellant's appeal has failed. We see no reason to deprive the 1st respondent costs. Accordingly, we order that the appellant shall pay the 1st respondent the costs of this appeal and the costs of the trial court.

Dated and delivered at Nakuru this 27th day of February, 2026.

M. WARSAME

.....
**JUDGE OF
APPEAL**

J. MATIVO

.....
**JUDGE OF
APPEAL**

M. GACHOKA C.Arb, FCIArb.

.....
**JUDGE OF
APPEAL**

*I certify that this
a true copy of the
original.*

Signed.

DEPUTY REGISTRAR.