REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KABARNET

ELC APPEAL NO. E007 OF 2025

MAGDALENE JEPTUMO KEITANY ..... APPELLANT

= VERSUS =

NATIONAL IRRIGATION AUTHORITY ..... RESPONDENT

JUDGMENT

(Being an appeal from the Judgement of Hon. Edwin Mulochi delivered on 30th January, 2024 in Kabarnet SPM ELC No. 22 of 2019)

Introduction

1. The appellant herein instituted a suit in the lower court to wit, Kabarnet SPMC ELC Case No. 22 of 2019 seeking judgment against the respondent for a declaration that she is entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land known as Unsurveyed Residential Plot A Marigat town (hereinafter

referred to as the suit land); an order of permanent injunction restraining the respondent through the Senior Scheme Manager, Perkerra Irrigation Scheme, by himself, his agents and/or servants from entering into, clearing bushes, felling trees, blocking access to and/or constructing temporarily structures on the suit land; an order for vacant possession of the suit land; costs of the suit and interest.

2. As can be discerned from the averments/contentions in the plaint, the appellant's suit was premised on the grounds that the suit land belongs to the Estate of Francis Kandagor Keitany which estate she represents; that on 15th July 2019, the respondent through its agents or servants trespassed into the suit land and commenced clearing bushes and cutting down trees with the objective of taking occupation of the suit land without her permission.

3. Lamenting that owing to the actions of the respondent complained of, she had suffered and continued to suffer loss and damage (deprivation of use, full possession, enjoyment

of the suit land and destruction of the perimeter fence securing the suit land), the appellant instituted the suit which forms the subject matter of this appeal seeking the reliefs listed herein above.

4. Upon being served with the suit papers, the respondent filed a statement of Defence and Counterclaim, dated 8th August 2019, in which it denies the allegations levelled against it and *inter alia* contended that the suit land forms part of the land set apart for Perkerra Irrigation Scheme hence public land.

5. Terming the appellant's claim of entitlement to the suit land misconceived and lacking legal basis, the respondent contended that the letter of allotment dated 25th January, 1995 purportedly issued to Francis Kandagor Keitany by the Commissioner of Lands in respect of the suit land is illegal, null and void to the extent that the suit land is located within the respondent's Perkerra Irrigation Scheme.

6. By way of Counterclaim, the respondent sought judgment against the appellant for a declaration that the letter of allotment issued to the deceased, Francis Kandagor Keitany, on 25th January, 1995 by the Commissioner of Lands for the suit land and which purports to be located within the respondent's Perkerra Irrigation Scheme, is illegal, null and void and the same be cancelled. The respondent also sought the costs of the suit.

7. When the case came up for hearing, the appellant relied on the letter of allotment issued to her deceased husband, Francis Kandagor Keitany, by the Commissioner of Lands on 25th January 1995, which she produced as Pexbt 2.

8. On whether the allotee complied with the conditions set out in the letter of allotment, the appellant stated that he did. However, she had nothing before court that could prove that the allotee met the conditions set out in the letter of allotment.

9. In re-examination, the appellant stated that she was unable to confirm whether all the conditions set out in the letter of allotment were complied with.

10. Concerning the Part Development Plan prepared in respect of the suit land, Mark Odhiambo, who testified as PW2 stated as follows: -

> **"…the plan does not have a reference number. It is however not complete…It does not indicate who drew it….It does not indicate who certified the plan…".**

11. On its part, the respondent availed Enos Wafula Simuyu (DW1) a former Manager of Perkerra Irrigation Scheme.

12. DW1 informed the court that the suit land is within Perkerra Irrigation Scheme and that it is part of the gazetted land belonging to Perkerra Irrigation Scheme.

13. According to DW1, the suit land is where a restaurant belonging to Perkerra Irrigation Scheme operated in 1980s.

14. DW1 further informed that the court that the respondent was not aware of the purported allocation of the suit land to the appellant's husband and that they only got to know about the appellant's claim to the suit land when they cleared the bushes that had grown on the suit land.

15. DW1 produced Gazette Notice No. 4643 of 1959 which set apart land for the Perkerra Irrigation Scheme, among other documents.

16. DW1 further informed the court that the coordinates outlined in Gazette Notice No. 4643 of 1959 show that the suit land falls within the land reserved for Perkerra Irrigation Scheme.

17. Upon considering the totality of the evidence adduced before him, the learned trial magistrate determined that the appellant had not proved her case on a balanced of

probabilities and dismissed it with costs to the respondent. In dismissing the appellant's case, the learned trial magistrate stated/held: -

> **"…From condition three, it is apparent that payment of the Kshs.26, 817.00 was the condition precedent to the deceased's ownership of the suit property. In the absence of evidence of the above conditions were met, I am unable to find that ownership of the suit property was passed to PW1. I consequently, conclude that PW1 has not proved, to the requisite standard, that the suit property belonged …"**

18. Dissatisfied, the appellant appealed to this court on the grounds that the learned trial magistrate erred by: -

    i) Basing his finding on wrong considerations;

    ii) Failing to take into account and to consider the evidence adduced on her behalf;

    iii) Failing to appreciate the submissions of her counsel; and

iv) Arriving at a decision that is unsupportable in law or on the basis of the evidence adduced.

19. The appellant prays that the appeal be allowed, the judgment in favour of the respondent be set aside and that she be awarded the costs of the appeal and the suit before the lower court.

20. The appeal was disposed of by way of written submissions.

SUBMISSIONS

Appellant's submissions

21. In her submissions received on 24th October 2025, the appellant gave a brief background of the case before the lower court and framed two issues for the court's determination namely;

i) Whether the learned trial magistrate misdirected himself and based his findings on wrong considerations and

ii) Whether the appeal should be allowed.

22. Concerning those issues, the appellant submits that it is not in dispute that her husband was issued with an allotment letter on 25th January, 1995 by the Commissioner of Lands with a PDP attached thereto; that there is no evidence of cancellation of the letter of allotment issued to her husband and that the PDP produced in evidence by herself shows that the applicable procedure of land allocation was followed.

23. Concerning the evidence adduced by the respondent, particularly the Gazette Notice showing that land was set aside/reserved for Perkerra Irrigation Scheme, the appellant submits that the Gazette Notice does not indicate whether the suit land forms part of the alienated land belonging to the respondent.

Respondent's submissions

24. In its submissions filed on 10th November 2025, the respondent asserts that the suit land forms part of the land

that was set aside/reserved for Perkerra Irrigation Scheme vide Gazette Notice No. 4643 of 1959; that the suit land was the site for members' club owned by the respondent until the 1980's a fact that is said to have been laid bare by the testimony of DW1.

25. On whether the Gazette Notice relied on by the respondent indicates that the suit land forms part of alienated land belonging to the respondent, the respondent submits that the evidence it adduced is sufficient to show that the suit land belongs to it. In that regard, the respondent points out that DW1 led evidence to the effect that the coordinates outlined in Gazette Notice No. 4643 of 1959 shows that the plot allocated to the appellant's husband falls within the land set apart for Perkerra Irrigation Scheme.

26. On the issue of proof of whether the suit land falls within land belonging to the respondent, the respondent points out that the appellant availed a surveyor as his witness and

states that the surveyor did not state that the suit land does not fall within the land reserved for the respondent.

27. The respondent submits that the appellant neither proved that the suit land does not fall within land reserved for Perkerra Irrigation Scheme nor proved that she is entitled to the suit land.

28. Based on the cases of **Lagat v. Kebut, James Joram Nyaga & Another v Attorney General & Another (2019) KECA 608 (KLR); Ali Mohamed Dagane v. Hakar Abshir & 3 Others (2021) KEELC 3664 (KLR)** and **Kenya Railway Corporation v Combined Warehouse Ltd & 5 others (Environment and Land Case 188 of 2017) (2024) KEELC 13690 (KLR) (11 December 2024) (Judgment)**, the respondent submits that it proved that the suit land is alienated Government land allocated to it and that the Commissioner of lands had no power to purportedly dispose of the land to third parties.

29. Maintaining that it proved that the suit land comprises alienated public land belonging to it, the respondent urges the court to dismiss the appeal with costs to it.

Analysis and determination

30. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see **Selle & Another vs. Associated Motor Boat Co. Ltd (1968) E.A 123** and **Mwanasokoni vs. Kenya Bus Service Ltd (1982-88)1 KAR** and **Kiruga vs. Kiruga & Another (1988) KLR 348**.

31. As pointed out herein above, the appellant instituted the suit that forms the subject matter of this appeal in the lower court claiming that the suit land belonged to the Estate of her husband, Francis Kandagor Keitany, (deceased) and that sometime in 2019, the respondent trespassed into the suit land thereby violating her entitlement to it.

32. In a bid to prove her case/claim, the appellant relied on a letter of allotment issued to her deceased husband on 25th January, 1995. On cross examination, the appellant acknowledged that the letter of allotment contained several conditions that her husband was required to meet and on whether she had evidence capable of showing that her husband met the conditions set in the land of allotment, stated that she had no evidence and could not tell whether her husband met all the conditions set in the letter of allotment.

33. Based on the appellant's inability to prove that her husband met the conditions in the letter of allotment, the learned trial

magistrate determined that the appellant had not proved her case on a balance of probabilities.

34. The issue arising from the foregoing is whether the trial magistrate erred in determining that the appellant did not prove her entitlement to the suit property. In that regard, it is trite law that a person desirous of relying on a letter of allotment as the basis of claim to entitlement of land has to prove that he/she has met the conditions set out in the letter of allotment. In that regard, see the decision of the Supreme Court in **Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)**, where the Court stated/held:-

> **"…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 <u>Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others</u> CA 60/1997 [unreported]; and in…. 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].**

59. The pronouncement in Gladys Wanjiru and Dr Joseph NK Arap Ng'ok (supra) has been echoed in various Environment and Land Court decisions post the 2010 Constitution, including; Lilian Wanjeri Njatha v Sabina Wanjiru Kuguru & another, Environment and Land Case No 471 of 2010; [2022] eKLR; John Elias Kirimi v Martin Maina Nderitu & 4 others, Environment and Land Suit No 320 of 2011; [2021] eKLR; and Kadzoyo Chombo Mwero v Ahmed Muhammed Osman & 11

others, Environment and Land Case No 42 of 2021; [2021] eKLR, to mention but a few.

60. 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. In Peter Wariire Kanyiri v Chrispus Washumbe & 2 others, Environment and Land Court Case No 603 of 2017; [2022]

eKLR, Kemei, J held as follows:"[15].*In the case at hand, in the absence of any title registered in the name of the plaintiff, the court is unable to hold that the plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences" [*Emphasis added].

61. While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until

he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed…"

35. My appreciation of the above decision of the Supreme Court is that a person who seeks to rely on a letter of allotment as a basis of his claim to entitlement to land must prove that they accepted the offer contained in the letter of allotment and fulfilled the conditions set out in the letter of allotment.

36. In the circumstances of this case, the appellant merely relied on the letter of allotment as a basis of proof of her entitlement to the suit land. Given that the allotment was challenged by the respondent, the appellant needed to prove that the allotment was proper legally, by leading evidence capable of showing that her husband indeed applied for the allotment of the suit land; that the application was considered and processed in accordance with the applicable law, processes/procedures; that upon been

offered the land, he accepted it and complied with the conditions set in the letter of offer.

37. Having failed to prove that her husband accepted the offer and complied with the conditions set therein, the appellant cannot reasonably fault the learned trial magistrate for determining that she did not prove her case to the required standard of proof. I reiterate that the appellant was required to not only prove that the suit land was allocated to her husband, but also prove that her husband accepted the offer and complied with the conditions set out in the letter of allotment.

38. On whether the respondent proved that the suit land is situated on land reserved for it, DW1 led evidence that the suit property is the site where the respondent used to operate its members club in 1980s. The appellant who claims that the suit land is not located in the land reserved for the respondent, did not lead any evidence capable of

proving that the suit land is indeed situated in land that is different from the one owned by the respondent.

39. In the absence of any evidence controverting the testimony of DW1 that the suit land is situated in the place the respondent used to operate its members club in 1980s, the trial court cannot reasonably be faulted for determining that the suit land is located in land reserved for the respondent and as a result, cancelling the letter of allotment issued in favour of the appellant's husband.

40. Arising from the foregoing, I find and hold that the appeal lacks merit and l dismiss it with costs to the respondent.

41. Orders Accordingly.

Dated, signed and delivered virtually at Busia this 23rd day of February, 2026

L. N. WAITHAKA

JUDGE

In the presence of;

Ms Tembo h/b for Mr Otieno for the Appellant

Mr Muraya for the Respondent

Court Assistant; Tracy