IN THE COURT OF APPEAL AT NYERI

(CORAM: KANTAI, LESIIT & ALI-ARONI, JJ.A.) CIVIL APPEAL NO. E068 OF 2021

BETWEEN

HASSAN HUSSEIN NOOR
(Suing as the legal representative of the Estate of **HUSSEIN NOOR HAJI**).....**1ST APPELLANT**
RASHID MAALIM ISSACK.....2ND

APPELLANT AND

ABDI TARI ABKULA.....RESPONDENT

(*Being an appeal from the Judgment of the Environment and Land Court of Kenya at Meru (Mbugua, J.) delivered on 5th May, 2021*

in

***ELC Case No. 111 of 2013*.)**

****

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the Environment and Land Court [ELC] (**L. Mbugua J.)** at Meru delivered on the 5th May, 2021 in Meru **ELC Case No.111 of 2013**.

2. A brief background of the matter is that, **Hassan Hussein Noor**, representing the estate of Hussein Noor Haji, (deceased plaintiff) and **Rashid Maalim Issack**, who are the appellants herein filed a suit against **Abdi Tari Abkula**, the respondent via plaint dated 24th April, 2013. They sought the following orders:

a. **A declaration order that the appellants are the rightful joint owners of Plot No. ISL/117/98/397 otherwise known as unsurveyed Residential Plot Kambi Garba/B/Isiolo;**

b. **A permanent injunction restraining the respondent, his servants/agents from in any way interfering with the suit plot; and,**

c. **Costs plus interest.**

3. It was the appellants' case that they were joint owners of all that parcel of land known as **Plot No. ISL/117/98/397**, otherwise designated as unsurveyed Residential **Plot Kambi Garba/B/Isiolo ('the suit property')** measuring approximately 6 acres or thereabout, free from any encumbrances, after the same, was allocated to them on 23rd September, 1997 vide Minute No. 19/97 of the Isiolo County Council. It was their case that the Part Development Plan (PDP) was accordingly approved on 25th August, 1998; later on 4th September, 1998, they were issued with an allotment letter by the Commissioner of Lands. They claim that they entered into possession in 1993 and have extensively developed the plot.

4. The appellants further stated that they delayed in paying council rates and on 9th February, 2011 they were issued with demand notice to pay the same to the County Council of Isiolo, which was the custodian of the land within Isiolo Township.

5. In 2010 the respondent, laid claim over the suit property. He lodged a complaint with the County Council of Isiolo. That

complaint was dismissed by the County Council and a ruling made in the appellants favour.

6. As the respondent was dissatisfied with the finding by the County Council, on 19th April, 2012, he threatened the appellants with forceful eviction and take-over of possession of the suit property, which threat culminated in the appellants filing the suit before the ELC.

7. The respondent entered an appearance and filed his defence and counter-claim dated 21st October, 2013. He denied the appellants' claim. He averred that he applied for the suit property in 1994 and was allocated the same through Minute NO. 5 of 1997. The approval was made vide the Minutes dated 20th June, 1997.

8. It was the respondent further claimed that he obtained the PDP from the Commissioner of Lands and had it approved by the Director of Physical Planning for **Plot No. 117/96/74 Isiolo Tow, Kambi Garba**, on 12th February, 1997. He was issued with a certificate as well as an allotment letter. He was shown his plot comprising 10 acres by the Surveyor, beacons were placed on the land, and he was allowed to fence it after he paid the Standing Premium arrears amounted to Kshs.347,531/- to the Isiolo County Council and Kshs.24,105 for clearance certificate and consent. Development for his plot was approved on 4th November, 2010 and since then, he has resided on the property. The respondent's position is that

should the appellants happen to have any property as alleged, then the same is not the same as his property, that the two plots were distinct as his was independent, surveyed and dully paid for.

9. The respondent therefore prayed that the appellants' suit to be dismissed and judgment entered in his favor, further that the allotments of the appellants' **Plot No ISL/117/98/397** be revoked and/or cancelled as the same was irregularly hived off from his **Plot No. ISL/117/96/74**; and, consequently for a declaration that he is the owner of **Plot Kambi Garba Isiolo No. 117/96/74** measuring approximately 10 acres; costs and interests thereon for the counter claim.

10. The appellants filed their reply to the counter claim dated 6th January, 2014 and stated that the acreage of the two (2) plots were distinct and different. They denied that they lived on the respondent's **Plot No. ISL/117/96/74**, and averred that contrary to the respondent's claim that he was the original allottee of the plot, it was clear that both parties were issued with allotment letters in the same year, with the difference being that the respondent was allotted an industrial plot which was 10 acres while the appellants were allotted a residential plot measuring 6 acres.

11. The matter proceeded for hearing by way of *viva voce* evidence and thereafter the parties filed written submissions. The appellants called two (2) witnesses while

the respondent called

four (4) witnesses. The appellants' first witness was the deceased Hussein Noor Haji, who was substituted with the 1st appellant. His testimony rehashed his witness statement, which was in tandem with their pleadings. In brief he stated that he and the 2nd appellant had in their possession a duly approved PDP as well as a letter of allotment dated 4th September, 1998. He said that they have been paying rates for the suit plot and that they also paid survey fees. The 2nd appellant's evidence was similar to that of the 1st appellant. However, he admitted that neither he nor the 1st appellant were in occupation or use of the plot. He testified that the Town Clerk, Isiolo County Council, on 15th May, 2012, ruled that the plot belonged to the appellants and that since then, the respondent had begun harassing them.

12. The respondent reiterated his statement which he adopted as his evidence. We need not rehash it as it is in line with his pleadings. He called **Ali Suleiman,** and his evidence was that he knew both the 1st appellant and the respondent. He said both had different plots at Isiolo Town, not far from each other, which he knew as he was a herder in the area. He said that he witnessed the 1st appellant subdivide his plot and sell to a Councilor, Ibrahim Gabara. The third witness for the respondent was **Abdi Kadie Juyo**, an Enforcement Officer with the Isiolo County Council, for 11 years from 24th October, 2007. He identified the respondent's exhibit 6, a letter dated 26th October, 2010, saying that he was the author; and that it

was a notice of preliminary Investigations served upon both parties to a dispute over **Plot No. ISL/117/96/74**. And setting a date when both parties would appear before him with their respective documents to prove ownership of the disputed property. He testified that only the respondent complied and took the property ownership documents. The appellant did not have all the documents. He testified that the respondent's documents tallied with those held by the Council. He said that he looked at the PDP documents by both parties and found that the respondent's document was issued to him two years earlier, in 1996, while the one for the appellants, which was **Plot No. ISL/117/98/397** was issued in 1998, he concluded that the respondent's documents were proof he was the legitimate owner of the disputed plot

13. One, **Tura Roba**, a neighbour corroborated the respondent's testimony that he was allocated the suit plot in 1994 and that he was present when the land was surveyed and beacons erected. He testified that by the letter produced by the respondent as exhibit 6, all parties claiming the plot in issue in the case were served and were required to present their documents for the land to the Council. He said he had entered the land without any documents, as did many others. He attended the meeting as did many others, including the appellants and the respondent. He said only the respondent was found to have the proper documentation that they were shown the beacons and that the verdict

declared to them that

the land belonged to the respondent. He said he moved out of the land after that, being satisfied with the verdict of the Council.

14. In the judgment of the trial court dated 5th May, 2021, Mbugua, J. held that it was clear from the evidence tendered that the appellants' ownership of the suit plot was not proved. She dismissed their suit. The learned judge moved further and found that the respondent was the owner of **Plot No. ISL/117/96/74** and proceeded to allow the respondent's counterclaim, which was for the revocation and/or cancellation of the allotments of the appellants' **Plot No ISL/117/98/397** and for a declaration that the respondent was the owner of **Plot Kambi Garba Isiolo No. 117/96/74** measuring approximately 10 acres. The learned judge found that the respondent failed to prove the allegation of fraud or the irregularity and illegality of the appellants' allotment letter to the suit plot and held that the conundrum was perpetuated by the officers of the defunct County Council of Isiolo, who were not parties to the suit.

15. Aggrieved and dissatisfied with the judgment the appellants preferred an appeal to this Court as evinced in their notice of appeal lodged on 20th May, 2021. In their memorandum of appeal dated 8th July, 2021, the appellants fault the learned Judge on the following grounds:

    1. **The learned judge erred in both law and fact in holding that the appellants' Plot No.**

ISL/117/98/397 and the respondent's Plot No ISL/117/96/94 were on the same Plot and against the weight of evidence before her and in total disregard of various experts.

2. **The learned judge erred in both law and fact in failing to appreciate that the appellants' Plot No. ISL/117/98/397 and the respondent's Plot No ISL/117/96/94 the two distinct Plots were not one and the same.**
3. **That the learned judge erred in both law and fact in holding that the respondent was the legitimate owner of Plot No. ISL/117/98/397 on the basis of an allotment letter failing to confer the same benefits to the appellants and also had an allotment letter in respect of their Plot No. ISL/117/98/397.**
4. **The learned judge erred in both law and fact in failing to find that the respondent is a trespasser on suit Plot No. Plot No. ISL/117/98/397 and ought to be restrained from further reference.**
5. **The learned judge erred in law and fact in failing to visit the locus in quo to establish the appellants and the respondent's case before delivering the judgment on 5th May 2021.**
6. **The learned judge erred in law and fact in failing to consider the appellants' written submissions and cited authorities' that support their case.**
7. **The learned judge erred in both law and fact in dismissing the appellants' suit without taking into account the special circumstances surrounding the case.**
8. **The learned judge erred in law in the manner she evaluated the evidence and thereby arriving at a wrong decision.**
9. **The learned judge erred in law by dismissing**

the appellants' suit and upholding the respondent's

counter claim and occasioned the appellants' miscarriage of justice."

16. The appellants thus pray that the impugned judgment be set aside and their appeal be allowed with costs of the appeal.

17. We heard this appeal on the 12th November, 2024. Learned counsel **Ms. Ocholla** was present for the appellants while learned counsel **Mr. Karanja** was present for the respondent. Both the appellants and the respondent relied on their written submissions dated 11th December, 2023, and 18th September, 2024, respectively.

18. In the written submissions for the appellants, **Messrs. Ojwang, Sombe & Co. Advocates** urged that the learned trial Judge erred in law and facts for holding that the appellants' Plot No. ISL/117/98/397 and the respondent's Plot No. ISL/117/96/94 were one and the same plot against the weight of evidence and in total disregard of various experts.

19. Further the appellants they challenged the findings of the learned trial Judge, urging that since the Judge trashed the expert reports on the subject land, there is no way a conclusive finding could be made to the effect that: one, the two plots were one and the same on the ground; two, that the appellants' title did not exist and the respondent's title was good; three, that even though no fraud was proved, appellants title should be cancelled; and four, as the Judge did not visit the site she had no basis of concluding that there was

confusion on the issue of the plots of land and that the same was caused by the County Council of Isiolo, the predecessor of the Isiolo County Government.

20. The appellants' counsel relied on the Ugandan case of **Zziwa Ssalongo & Another vs. Kafumba, High Court Civil Appeal No. 33 of 2012** for the proposition that a site visit is not mandatory but that it depends with the circumstances of the case. Counsel urged that the learned Judge failed to consider the special circumstances of the appellants' case and instead dismissed their case. He urged that there were contested issues, for instance, whether there were structures on the land or not, and that, therefore, there was a need for a site scene visit. For that proposition, he relied on another Ugandan case, **E. Kangye vs. E. Bwana High Court S. No. 38 of 1989**, where the learned Judge gave the view that a site visit '*could enable the witnesses to clarify what they have stated in court*

... when a court goes to locus in quo, it goes there to check on the evidence given in court and not to fill gaps.' Counsel also relied on a Ugandan case, **Badiru Kabalega vs. Sipiriano Muganga Kampala HCCCS No. 2 of 1987** where the Court observed that *'visiting locus in quo is for a party to indicate what he is claiming ... and for witnesses to clarify what they were stating in court and to show features like boundary marks.'*

21. Counsel, commenting on the burden of proof and the manner in which the evidence was evaluated by the trial Judge urged that under section 107 of the Evidence Act, '*he who asserts must prove.'* He urged that the appellant proved ownership of the suit land by the letter dated 15th May, 2012 from the County Council, which confirmed the land belonged to him.

22. The respondent's submissions were filed by counsel on record **Messrs. Mwirigi & Kaburu Advocates**. Learned counsel, submitting on the issue of whether the appellants acquired the suit land irregularly, illegally, unlawfully and fraudulently, referred us to the Survey Report by the Isiolo Physical Planner and Surveyor dated 20th July 2018 prepared after a visit to the site with the appellants and the respondent. The result of that site visit was that both parties were claiming the same plot on the ground, with the appellants' perceived plot measuring 7 acres and that of the respondent measuring 8.3 acres. He urged that the report was sanctioned by the trial court and admitted in court without any opposition, and should be considered. He also referred us to a letter from the National Land Commission (NLC) dated 19th December, 2019 in which the Commission reported that it did not have any details of PDP on Plot No. ISL/117/98/397. On the other hand, the NLC confirmed that the Plot No. ISL/117/96/74 was in their records, and an allotment letter was issued to the ABDI TARI ABKULA. Counsel urged that the letter was produced without any

opposition by the parties to the suit.

23. On the issue of who is the rightful owner of the suit land, learned counsel urged us to uphold the decision of the learned Judge and find it was correct to apply the principle in the case of ***Gitwany Investment Ltd vs. Tajmal Ltd & 3 Others [2006] eKLR*** where the Court stated that the first title in time should prevail based on the maxim that where two equities are equal, the first in time should prevail. Counsel relied on the Survey Report dated 20th July, 2019 aforementioned, which declared that the plot claimed by the two parties was the same plot on the ground; and the letter from the NLC which declared that in their records, only the respondent's documentation on the Plot ISL/117/96/74 could be traced but none for the Plot ISL/117/98/397.

24. In response to the issue of reports by experts, learned counsel cited the case of ***David Musyimi Ndetei vs. Daima Bank Ltd [In liquidation] [2009] eKLR*** for the proposition that expert reports are not binding but should only be rejected if there is proper and cogent basis for rejecting them. On the issue of authentication of a claim to land, learned counsel placed reliance on this Court's decision in ***Caroget Investment Ltd vs. Aster Holdings Ltd & Others [2019] eKLR***, where this Court dealing with similar issues of the authentication of documents on ownership of land cited the holding in ***James Henry Mundiar t/a Kabarak Development Services vs. Tradewheel Kenya Ltd [1987] eKLR*** that *'where two parties assert competing proprietary interest over one parcel of land,*

each must produce evidence in support of his claim.' Counsel also relied on the holding in the case of ***Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR*** to the effect that where the registered proprietor's root of title is under scrutiny, it is not enough to dangle the instrument of title as proof of ownership. One has to go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free of any encumbrance. Counsel urged that the learned Judge was right to find that the respondent was a bona fide allottee, having presented the relevant documentation as proof of the legality of his title.

25. This is a first appeal. As a first appellate Court our mandate is akin to a retrial. Under **rule 31 (1)(a)** of this **Court's Rules, 2022**, we are required to re-appraise the evidence and draw our independent inferences and conclusions. This mandate was explained in ***Abok James Odera T/A A. J Odera & Associates vs. 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 reanalyze 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."***

26. While we appreciate that we may, in appropriate cases, reverse or affirm the findings of the trial court, in ***Peters***

vs. Sunday

***Post Limited* [1958] EA 424**, the predecessor to this Court, stated that:

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."***

27. With respect to findings of fact by the trial court, this Court's position as stated by **Hancox, JA.** (as he then was), in ***Mohammed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183** is that:

> ***"The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."***

28. Upon our own assessment of the evidence, the submissions by counsel and the cases and the law relied upon, we find that what falls for our determination is:

    i) **Whether the learned Judge erred to find that Plot No. 117/96/74 otherwise known as**

unsurveyed Plot Kambi Garba Isiolo [the suit

land] was the same as Plot No. ISL/117/98/397 otherwise designated as unsurveyed Residential Plot Kambi Garba/B/Isiolo;

ii) Whether the learned Judge erred to find that the respondent was the lawful owner of Plot No. 117/96/74, the suit land; and,

iii) Whether any party was fraudulent in the acquisition of title to the disputed land.

29. On the first issue we note that the appellants and the respondent are claiming an unsurveyed parcel of land which had neither a lease nor a title deed. Each of the plots claimed had different description and numbers. The appellants claimed Plot No. 117/98/397, otherwise designated as unsurveyed Residential Plot Kambi Garba/B/Isiolo, while the respondent claimed Plot No. 117/96/74, otherwise known as unsurveyed Plot Kambi Garba Isiolo. From the evidence of the two parties, the plots were distinct. The appellants' position was that their plot was a residential one, measuring 6 acres, and was in a different location from that of the respondent. To the respondent, his plot was 10 acres in size which he had fenced and was in possession.

30. The learned Judge delivered herself thus, on the issue of the plots claimed by the two parties:

“54. At this juncture, I must point out that this is a classic case of the mess perpetuated by the

predecessor of the Isiolo County Government, the defunct County Council of Isiolo which appears to have been dishing out land in a pedestrian manner. For instance, in this particular case, the .suit parcel was given different numbers and was also identified as a residential plot for the plaintiff and as an industrial plot for the defendant. The reality is that the plot is one and the same and there is not the slightest indication that the plots could be in separate areas."

31. The respondent filed, among other documents a document dated 20th July, 2018 which is at page 104 of the record of appeal. It has the following reference and details:

"RE: COUNTY PHYSICAL PLANNING REPORT ON LAND CASE NO. 111 OF 2013

THE ENVIRONMENT AND LAND COURT AT MERU

County Physical Planning Officer and County Land Surveyor from this office visited the site in respect to the disputed plot' thus this report:-

Date of visit: 11th July, 2018.
Court Order dated 27th May, 2018 requiring the physical planner to produce a report on plot no PDP NO ISL/ 117 /98/397 Kambi Garba Isiolo.

<u>Present</u>

1. **County, Physical Planning Officer** **Kimutai M. Cheruiyot**
2. **County Land Surveyor** **Erick Mwongela**
3. **The Plaintiffs** **Hussein Noor Ali and Rashid Maalim Isaak**
4. **Defendant** **Abdi Tari Abkula**

Ground Position:

The disputed land is in Kambi Garba area of Isiolo Town. The plaintiff and the defendants are claiming ownership of the same plot on the ground

G. NTEERE

For: County Physical Planning

Officer ISIOLO COUNTY."

32. The learned Judge rejected this report observing that the report was not prepared through a court sanctioned process; that the court gave no orders on 27th May, 2018 for the report to be availed; that on the order made was on 22nd February, 2018 was on the request of the counsel for defendant to have summons requiring attendance to the physical planner and the lands officer in the County Government of Isiolo as expert witnesses. The other reason advanced by the court was that the report itself was inconclusive as it recommended the director of physical planning and the National Land Commission to file a report.

33. Both the appellant's' and respondent's counsels were opposed to the manner in which the report was rejected. The appellants counsel submitted that the learned trial Judge was in error for rejecting the expert reports on the subject land, urging that there was no way the court could reach a conclusive finding without them. Considering the learned Judge's judgment, the only reports rejected were the report by the Physical Planning Officer and the County Surveyor and the letter from the NLC at page 106 of the record of

appeal. On the other hand, the

respondent's counsel, citing ***David Musyimi Ndetei vs. Daima Bank Ltd*** **[In liquidation]** ***[2009] eKLR*** urged that expert reports are not binding but should only be rejected if there is proper and cogent basis for rejecting them.

34. The respondent produced the Surveyor's Report as part of his exhibits in support of his case. Was the learned Judge entitled to reject it? It is trite law that an expert's opinion can only be rejected if there is proper and cogent basis for rejecting it. The principle was fortified in the case ***Ndolo vs. Ndolo*** ***[1995] KLR 390***. The Court of Appeal held;

rejected."

35. The Report speaks for itself; it was a report of the results of a

site visit of the disputed plot. The two officers who were present and later prepared it were the County Physical Planning Officer and County Land Surveyor, relevant experts in the field, and the subject matter of this case. Apart from

the two officers, those who went for the site visit were the

appellants and the respondent. The report shows that the two parties each identified their plot on the ground, and the experts concluded that the two parties identified the same area on the ground as the one they were claiming, with the only variation being the acreage, the appellants claiming an area of 6 acres and the respondent 10.3 acres.

36. Contrary to what the learned Judge concluded, the report was complete, as the site visit aimed to identify the plot claimed on the ground. The report returned a firm conclusion that both parties were claiming the same area on the ground. Further, the report recognized the order directing them to make the site visit and make the report as a court order that was made on the 27th May, 2018. Going by the record itself, it shows that the issue of the report was brought before the court by Mrs. Kaume, then acting for the respondent, in the presence of the appellants and their counsel Mr. Nyakwara on 22nd May, 2018. Mrs. Kaume applied for summons requiring the County Physical Planning Officer and the Lands Officer to produce their report on the matter as expert witnesses. The learned Judge fixed a mention date before the Deputy Registrar [DR] for 13th September, 2018 to confirm with the parties that the report was indeed filed. The parties convened before the DR as ordered and confirmed that the report was indeed in the record of the court.

37. Even if we are to suppose that the report was not sanctioned by the court, was that sufficient cause to reject it. We do not think so, especially where both sides agreed that it should be considered by the court and also where both parties presented themselves for the site visit and voluntarily and actively participated in identifying the impugned plot on the ground. Secondly, the two County Council Officers who conducted the site visit were experts in the field. That explains why the appellants challenged the rejection of the report and why the respondent felt it should only have been rejected if there was a proper and cogent basis for rejecting it. Further, the report was relevant, made by persons whose business it was to identify boundaries between plots of land; moreover, there was no issue raised by the parties challenging the report on any grounds. We agree that the learned trial Judge should have taken the report into consideration along with other evidence. We find that there was no other way, given the evidence adduced in this case, that the learned Judge could have concluded that the plots claimed by the parties were actually the same plot on the round.

38. The plots were indeed one and the same plot on the ground based on the issuing authority at the time, through the impugned report aforementioned. Even though the learned Judge did not give the reasons or basis of coming to the conclusion that the plots were one and the same, her conclusion is nevertheless correct.

Whether the learned Judge erred to find that the respondent was the lawful owner of Plot No. 117/96/74, the suit land.

39. The learned Judge identified the first issue for determination and delivered herself thus:

> "**40. The dispute herein appears to be a typical case of double allocation of land, an issue which is quite prevalent in the County Government of Isiolo. Thus the issue for determination is; who is the owner of the suit land identified by the plaintiff as plot NO ISL/117/98/397 otherwise designated as unsurveyed residential plot Kambi Garba/B/Isiolo also identified by the defendant as plot NO ISL/117/96/94 designated as Unsurveyed industrial plot no. Kambi Garba Isiolo…"**

40. In determining the true owner of the suit land, the learned Judge observed as follows:

> **57. Further, the parties appear to place a lot of emphasize on the fact that they have in their possession approved pdps. However, as rightly submitted by the plaintiffs, pdps are not prove of ownership. This court rendered itself on this issue in the case of Titus Musya Musee v Francis Ichamui M'Mwenda [2020] eKLR as follows;-**
>
> "Physical Development Plans(PDPs), also commonly known as Part Development Plans are planning tools, used for general purposes of determining land use in a particular area of the city, municipality or council (read county). Thus the PDPs cannot solely be used to confer or determine rights in the land. The land ought to have been surveyed in order to generate survey

maps such that the specific portion of the land for

each claimant is discernible from a map and on the ground."

58. In the light of the foregoing analysis, can the court wring its hands in despair? Certainly not. This court is duty bound to render a decision weighing the evidence of each party as against the opponent. To this end, the court will define the import of allocation of land through minutes as well as through a letter of allotment.

59. In the County Council of Meru & 2 others v P.C.E.A thro' the Registered Trustees [2020] eKLR, I held that;

"Minutes alone do not confer any proprietary interest in land. This is because minutes are an expression of an intention to allocate land. The commitment to actualize the intent to allocate is manifested in the issuance of the letter of allotment from the allotting authority. Demarcation of the parcel of land in question is then carried out through the process of survey. Thus the resolution of the council as captured in the minutes must be put into effect in order to give rise to a bundle of rights in land capable of being protected."

41. The learned Judge citing High Court decisions in ***Stephen Mburu & 4 Others vs. Comat Merchants Ltd & Another [2012] eKLR*** and ***Mbau Saw Mills Ltd vs. Attorney General (for and on behalf of the Commissioner of Lands) & 2 Others [2014] eKLR*** observed that a letter of allotment does not confer any property rights unless there is acceptance and payment of the stand premium and ground rent.

42. In this case each of the parties had allotment letters which they used as the basis for their claim to the suit land.

This

Court in the case of ***Munyu Maina vs. Hiram Gathiha Maina***, supra, held:

> ***"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."***

43. The High Court, in the case of ***Caroline Awinja Ochieng & Another vs. June Anne Mbithe Gitau & 2 Others [2015] eKLR***, while dealing with the issue of who between two parties was the owner of the unregistered suit property, had the following to say:

> ***"In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.***
>
> ***25. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the***

delivery of deeds or documents which assist in proving not only dominion of

unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically 'the essential indicia of title to unregistered land'': per Nourse LJ in Sen v Headley [1991] Ch 425 at 437."

44. In this Court's decision in ***Wreck Motor Enterprises vs. Commissioner of Lands & 3 Others [1997] eKLR***, dealing with the issue of determining the rightful owner of land in a dispute involving:

> ***"Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held."***

45. The suit land is unregistered, a matter we note that the learned trial Judge was well aware of. After analyzing the documents presented by both parties, the learned Judge citing ***Mbau Saw Mills Ltd vs. Attorney General for and on behalf of the Commissioner of Lands) & 2 Others***, (supra) found that the letter of allotment does not confer land. Likewise citing ***County Council of Meru & 2 Others vs. P.C.E.A thro' Registered Trustees***, (supra) found that neither do Minutes of the County Council Committee charged with allocation of Council.

46. The learned Judge determined the issue of the rightful owner of the suit land on the basis of two criteria? The meeting of conditions set in the letter of allotment and on the maxim of equity that the first in time prevails. In that regard, the Judge considered that the respondent had in addition to the letter of allotment paid the stand premium in respect to the allotment required in the sum of Kshs.347,531/- as well as the sum of Kshs.24,100/- for clearance and consent to pave the way for the issuance of a lease; and submitted Dexh.9 and 5 as proof of the said payments. She noted that the payments were not made within the timelines given in the letter of allotment but that the allotting authority accepted the payments and issued receipts to that effect. As for the appellants, she found no evidence to indicate that they made attempts to meet the conditions outlined in the letter of allotment by payment of the stand premium and the clearance and consent fee. Secondly, she found that the letter of allotment issued to the respondent was dated 3rd July, 1998 and first in time to that issued to the appellants, which was dated 4th September, 1998.

47. We agree with the learned Judge's analysis and the conclusions reached in determining the issue of the rightful owner of the suit land. The respondent's letter of allotment was first in time. In addition, he complied with the terms set in it and having complied paved the way for the issuance of a lease. The appellants did not comply with the conditions set for the issuance of a lease, meaning that the letter of

allotment, which

is akin to an offer under the law of contract, could not have crystallized for the issuance of the lease since by failing to meet the terms given was akin to rejection of the offer made to them by the County Council. On the other hand, issuing a second letter of allotment for the same parcel of land to the appellants, without cancelling the first one issued to the respondents was invalid and could not constitute an offer for the same parcel of land. The first offer [letter of allotment] to should have been cancelled before issuing a second or another one. Failure to cancel the offer to the respondent meant that the Council was offering to the appellants what they no longer had.

Whether any party was fraudulent in the acquisition of title to the disputed land.

48. The learned Judge found that fraud had not been proved against either party in the case, finding rather that the County Council, the allocating body, was to blame for the double allocation disguised by the changing of the plot number, its description and its acreage to make it appear as if they were two different plots. Indeed, the two parties' position throughout the trial was that the plots were different and distinct based on the difference in size and description. The position, in our view, was cleared by the Surveyor's Report dated 20th July, 2018, which was made after a site visit by both parties and which report was produced by the respondent with the support of the appellants.

49. We hold that even though none of the parties were involved in any fraud in the issuance of the letter of allotment, it is the respondent who has the lawful right to title to the suit land; and that the appellants' title, although procedurally obtained is in fact a sham and cannot confer any right to the suit land.

50. In conclusion, we find that the learned Judge came to the correct decision with the material before her and that she cannot be faulted. We therefore find that the appellants appeal is devoid of merit, uphold the learned trial Judge's judgment dated 5th May, 2021. Consequently, the appellants appeal is dismissed with costs of the appeal to the respondent.

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

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF

APPEAL ALI-

ARONI

.....

JUDGE OF APPEAL

I certify that this is

a True copy of the original
Signed
DEPUTY REGISTRAR