



Ngacha (Suing as the personal representative of the Estate of John Ngacha Nganga - Deceased) & another v Maranga & 3 others; Ngene & 6 others (Interested Parties) (Environment and Land Case 165 of 2018) [2025] KEELC 5544 (KLR) (22 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5544 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE 165 OF 2018
JG KEMEL, J
JULY 22, 2025
FORMERLY ELC NO 503 OF 2015

BETWEEN

JANE MARGARET WANJIKU NGACHA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN NGACHA NGANGA - DECEASED) 1ST PETITIONER
CHARLES MUTURI NDEGWA 2ND PETITIONER

AND

CATHERINE NJERI MARANGA 1ST DEFENDANT
KENNEDY NGANGA MARANGA 2ND DEFENDANT
CHIEF LAND REGISTRAR 3RD DEFENDANT
HON ATTORNEY GENERAL 4TH DEFENDANT

AND

JOHN KIBUGI NGENE INTERESTED PARTY
ELIZABETH WANGUI MAINA INTERESTED PARTY
FRANCIS MUTUNEH PETER NDERITU INTERESTED PARTY
GRACE NJERI INTERESTED PARTY
PETERSON K NYORO INTERESTED PARTY
CATHERINE WANGECHI NJOKI INTERESTED PARTY
JOHN GACHINJI THAIRU INTERESTED PARTY



JUDGMENT

The Pleadings

1. Vide an amended plaint dated the 23/11/2021 the Plaintiffs filed suit against the Defendants seeking the following orders;
 - a. A declaration that the land parcel Number LR No 4953/4223 is legally and lawfully belongs to the late John Ngacha Nganga herein
 - b. A declaration that the certificate of title held by the 2nd defendant is irregular illegal and unlawful and that the same be surrendered to the 3rd Defendant for cancellation and the register be accordingly amended and rectified to reflect the beneficial owner, the 1st Plaintiff.
 - c. An order be directed to the 3rd defendant herein to issue to the family of the late John Ngacha Nganga with a certificate of title for parcel Number LR No 4953/4223 as the beneficial and lawful owner.
2. The 1st Plaintiff averred that her late Husband, John Ngacha Nganga (Nganga) purchased the suit land from one Francis Mamwaka Mulu (Mwamwaka) on 13/10/2006 at a consideration of Kshs 1.0 Million. Among the documents handed over by Mamwaka were; allotment letter, copy of ID, survey plan, original deed plan. No. 240607 dated the 13/3/2002.
3. That Nganga took possession of the suit land, paid stand premium, rent registration fees, approval fees, survey fees to the tune of Kshs 161,990/- and was issued with a new letter of allotment in place of the old one held by the vendor.
4. That on 28/4/2009 Nganga obtained a subdivision scheme approval from Thika Municipal Council on 10/9/2009 which was approved the subdivision of the property into 30 plots of which he sold 21 and retained 9.
5. The 2nd Plaintiff avers that he developed a modern house worth more than Kshs 22 Million on his portion of the land. The 1st Plaintiff also has developed 11 rental houses on the property valued at Kshs 45 Million. Both aver that they have been paying rates and other utilities to the Thika Municipal Council
6. That Nganga was surprised to learn that the 2nd Defendant had been issued with a title in respect to the suit land despite having paid for it. His complaint with the Police and the Ministry of Lands officials revealed that the title held by the 2nd Defendant was fraudulently acquired. He has pleaded particulars of fraud against the 1st and 2nd Defendants in para 20 of the Plaint.
7. Vide a statement of defence dated the 11/11/2015 the 1st and 2nd Defendants denied the Plaintiffs claim and averred that the 2nd Defendant is the lawful owner of the suit land. They contended that the alleged acquisition of the suit land by the Plaintiffs was wrought with fraud and irregularity. They denied the allegations of fraud and irregularity levelled against them by the Plaintiffs and sought to put them on strict proof. They urged the Court to dismiss the suit with costs
8. In their counterclaim they reiterated the contents of the defence and averred that the 2nd Defendant was allocated the suit land vide a letter of allotment dated the 9/7/98 and a correspondence file No. 208924. That they accepted the offer and paid the stand premium and all the relevant land charges.



Later in 2000 the land was surveyed as Land Reference No 4953/4223 with two other plots being referenced as Nos 4953/4221 and 4222.

9. The 1st and 2nd Defendants have pleaded fraud on the part of the Plaintiffs and the 3rd and 4th Defendants under para 31 of the counterclaim. Consequently, they sought the following orders;
 - a. A declaration that the property known as LR No 4953/4223 comprised in Grant No 1411554 situate in Thika Municipality and containing by measurement 1.056 ha or thereabouts does belong to the 1st and 2nd Defendants
 - b. That the Plaintiffs and whomsoever is in possession of the property known as LR No 4953/4223 comprised in measurement 1.056 ha or thereabout within 60 days or determination of the suit herein yield vacant possession of the same.
 - c. That in the alternative but without prejudice to the above the Plaintiffs together with the 3rd and 4th Defendants jointly and or severally do orders as this Court shall compensate the 1st and 2nd defendants for the property declared to be lawfully theirs being L R 4953/4223 at the current market value.
 - d. That the Plaintiffs, 3rd and 4th Defendants be compelled to pay costs of the suit.
 - e. Any other or further orders as this honourable Court shall deem fit to grant.

Joinder

10. John Ngacha Nganga (Nganga) died on 18/2/2021 and was substituted with his wife Jane Margaret Wanjiru Ngacha on 10/11/21.
11. On application vide the Notice of Motion dated the 26/3/23 the 1st – 7th Interested Parties (IPs) were enjoined into the case with the leave of the Court granted on 9/5/23.

The 3rd & 4th Defendants' Statement of Defence

12. The 3rd and 4th Defendants Statement of Defence is dated 20/07/2015. The 3rd and 4th Defendants deny all allegations levelled against them. They deny that a demand and notice to sue was ever issued or served upon them. On a without prejudice basis, they state that should they be found culpable for fraudulent transfer and/or registration to the 1st and 2nd Defendants on reliance of misrepresentation of the 1st and 2nd Defendants and the Plaintiffs have suffered loss or damage, they shall seek indemnity under order 1 rule 24 of the Civil Procedure rules. They therefore pray that the Plaintiffs' suit be dismissed with costs.

The evidence

13. PW1 – Jane Margaret Wanjiru Ngacha testified and relied on her witness statement dated the 8/6/2015 and 30/3/22 as her evidence in chief and produced documents marked as PEX No 1-80.
14. She informed the Court that she was the wife and the Administrator of the estate of Ngacha, who died in 2021.
15. She stated that she and her husband were introduced to the suit land by an estate agent in 2006. Upon being shown, they liked the plot and in July 2007 they met one Francis Mamwaka Muli (Mamwaka or Muli) , the owner of the suit land who at the time worked with the Ministry of Lands, Nairobi. Among the documents Mamwaka showed them were the initial allotment letter in his name, Survey map showing the suit land, original deed plan and copy of the letter of indent & part development plan (PDP). They agreed at the price of Kshs 1.0 Million which was paid at the signing of the sale agreement/



informal transfer dated the 13/6/2006 and 15/11/2006 respectively. They were put in possession and given the original deed plan which she holds to date.

16. The next task was to process the title but was faced with a Government embargo which lasted from 2006-2008. In the meantime, they registered the plot with the Municipal Council as a rate payer. They started paying for services such as rates. They obtained subdivision approval and subdivided the land into 30 plots out of which they sold 20 plots to third parties, donated one to their Church Pastor and obtained building plans approvals and developed a commercial building valued at Kshs.45Million and completed in 2009.
17. On payment of stand premium, the witness stated that the delay in payment was occasioned by the loss of the first cheque dated 9/9/2008 as well as the Government embargo on issuance of new grants.
18. Come 2008 the embargo was lifted and they commenced the process of title processing. They accepted the conditions, and paid Kshs 161,990/- stand premium through a banker's cheque. The documents were left at the Lands office as the file could not be traced. The cheque disappeared and upon raising a complaint they were asked to issue another bankers cheque of Kshs 161,990/- which they did on 15/8/2011 vide receipt No 071962. What followed was another waiting period for the title, however in 2012, they discovered that unknown to them the 2nd Defendant had obtained a title for the suit land. They reported the matter to the police and a recommendation was made upon investigation that the 2nd defendant's title should be cancelled.
19. The witness further informed the Court that the 1st and 2nd Defendants falsified the letter of allotment and issued it to a minor; swore a false affidavit that the deed plan was lost; illegally removed the documents from Ngacha's file and used it purporting to be their file.
20. In cross, the witness stated that Mamwaka had not paid for the stand premium hence held no receipts nor a title but had an original deed plan. That she was aware that Mamwaka and Nganga were charged in Court. That though Mamwaka was convicted the charges against Nganga were dropped upon his demise.
21. She stated that when they sold the subdivisions to third parties in 2009 they had not obtained title. She added that to date she holds no title to the suit land. She stated that she does not have approved building plans though she has constructed a commercial building thereon.
22. Shown the letter (indent) dated the 25/2/2002 she admitted that the said letter was signed by Mamwaka. The survey was done by a private surveyor as disclosed on the indent namely Wilson Kamau. The original deed plan was later collected by Ngacha on 8/2/2013 from the lands office when it became clear that the 2nd Defendant had obtained a title for the suit land. This was the deed plan that Mamwaka had handed over to Ngacha in 2006.
23. In further cross by Learned state Counsel Ms. Nyawira the witness stated that she did not have any evidence in support of the Kshs 1 Million paid by Mamwaka. That Mamwaka never showed them the application letter in support of the application for the land from the Commissioner of Land. She stated that the letter of allotment was to be accepted within 30 days in default, it lapsed. That the letter of allotment was issued in 1998 and the deed plan in 2002.
24. Under cross examination by Mr Muchiri for the (IPs), the witness stated that she and her husband sold portions of the land to the IPs some of whom have developed the plots on the basis of a letter of allotment and a deed plan received from Mamwaka.
25. PW2 – Bishop Charles Muturi testified and relied on his witness statement dated 8/6/2015 in evidence in chief. He is the 2nd Plaintiff. He purchased the land in 2008 for Kshs 300,000/- and took possession



- in 2010. He has built a 5-bedroom house on his plot. He has lived on the land for 14 years to date. He purchased the land based on the letter of allotment, the deed plan and the receipts in Ngacha's possession from the Thika Municipal Council. Ngacha did not have a title for the suit land at the time of purchase and neither did he enter into any agreement for sale. He has two plots in the area one of which he has built a house valued at an estimated Kshs. 22 Million. He believed that the land belonged to Ngacha. He secured the building plans for his house from the Thika Municipal Council.
26. PW3 – Cyrus Kiogora Murungi introduced himself as a retired Civil Servant having worked for the Ministry of Lands from 1989 to 2013 and National Land Commission from 2013 to 2023.
 27. He prepared a report dated the 13/3/2013 at the request of the Directorate of Criminal Investigation (DCI) who investigated a complaint on the suit land. The letter of allotment in the name of Ngacha is dated 9/7/98. According to the file, the land was allocated originally to Ngacha and there was nothing to show it had been allocated to Mamwaka. No sale agreement between Ngacha and Mamwaka. No evidence of payment of stamp duty declared and or paid. Ngacha paid for the land in 2011 contrary to the special conditions requiring payment of stand premium within 30 days. If there is good reason for non-compliance, the payment may be made late but with the authority of the Commissioner of Lands. No such authority was demonstrated by Ngacha. The land had two correspondence files; 208924 and 227459. Ngacha's title processing stalled because there was another title issued on the same land. File No 208924 contained the letter of allotment in the name of Ngacha. Equally file No 227459 contained Ngacha's documents. The land in respect to file No 227459 is in Athi River. File No 208924 was opened in the name of 2nd Defendant. It is Plot No 4953/4223. File no 208924 was opened before file No 227459. The letter of allotment in the name of Ngacha was backdated to 1998. This letter of allotment was irregular. All in all, it is irregular for one parcel of land to have two files/titles.
 28. On the informal transfer he stated that it is not part of the forms in the land statutes or our laws. Unless the conditions in the letter of allotment have been accepted and paid, there is no interest that will have been conveyed. A letter of allotment is an offer and not a title capable of being transferred. Mamwaka did not comply with the letter of allotment and therefore acquired no interest in the suit land and hence sold nothing to Ngacha.
 29. The witness stated that for one to be allocated land, he has to apply, application is processed including checking if the land is available and the status of the applicant as to the ability to develop the land. The letter of allotment in the name of the 2nd Defendant is dated 9/7/98 (same date as that of Ngacha). The file for 2nd Defendant was opened on 2/10/2012 and noted by the records department (SPRO) on 11/4/2005 which is unprocedural as the file opening precedes noting. The 2nd defendant's file was opened in 2012 while that of Ngacha was opened in 2008. The 1st Defendant collected the stale cheque which was paid by Ngacha pointing to her involvement in the file swap. The deed plan is authentic and the holder of the original deed plan is likely to be the owner of the land.
 30. PW4- Zacharia Mackenzie Ndeti testified and introduced himself as a professional valuer. He was instructed by Ngacha in 2019 to value the suit land. He produced the valuation report dated 28/3/2011. He relied on the letter of allotment, deed plan, subdivision scheme approved by the county council of Thika and rates payment receipts to value the suit land. The property was developed with three buildings, some of which were occupied by tenant.
 31. PW5- Emmanuel Karisa Kenga stated that he is document examiner of more than 30 years and a retired Police Officer. He relied on his witness statement on record dated the 24/3/22 and produced the handwriting report on page 34 – Vol 2 of the trial bundle. He got instructions and the documents from the Plaintiff's Counsel to carry out the examination. He had testified in the criminal case as well, where Mamwaka and Ngacha were charged for inter alia abuse of office and fraud. His finding is that



- Mamwaka did not sign the letter of allotment dated the 9/7/98 in favour of Kennedy Maranga and that the same is a forgery. That his findings agree with those of another Document examiner namely IP. Chania who has also examined the documents. That IP. Michira another document examiner disagreed with them when he made a finding that Mamwaka signed the three letters of allotments.
32. DW1- Gordon Odeka Ochieng testified and introduced himself as the Director, Land administration in the Ministry of Lands Public Works Housing and Urban Development. He did not find an application for the land by the Plaintiffs on the file. The Letter of Allotment once issued forms a contract between the Government of Kenya and the allottee. The original deed plan must be annexed to the title. If the original is lost then the Director of Survey may certify a deed plan. A minor may be allocated land as long as the status of the minor is disclosed on the title and a guardian/trustee holds the interest in trust. Neither the 1st and 2nd Defendants applied for the land. There was no evidence to show that the 1st Defendant held the land in trust for the 2nd Defendant albeit admitting that he was a minor at the time of allotment.
 33. DW2- Kennedy Nganga Maranga, the 2nd Defendant relied on his witness statement dated 11/11/2015. He produced documents marked as DEX No 2-39.
 34. He stated that in 1997 the 2nd Defendant, his mother applied for allocation of the suit land in his name. Since he was 17 years then and in school it is the 1st Defendant who applied for the land and processed the title on his behalf. They inspected the land in 1997. It was undeveloped. The land was allocated to him vide letter dated the 9/7/1998 ref No 231136/XIII- unsurveyed plot C- Thika Municipality. The letter was signed by one Mamwaka on behalf of the Commissioner of Lands. Without any evidence, the witness stated that the 1st defendant accepted the terms and conditions of allotment in 2000 and paid a cheque of Kshs 28,000/-. The acceptance was made after the lapse of the 30 days stipulated in the letter of allotment.
 35. A title was prepared but the same was not signed as stand premium had not been paid in full hence the file was returned to the registry awaiting payment of the full amount. However, the sum of Kshs 161,000/- being part payment of stand premium was paid on 3/2/2012.
 36. He added that he was not involved in the survey of the land. The land was surveyed in 2000 and given a land reference No 4953/4223 at the request of the 1st Defendant. He does not know if a Part Development Plan (PDP) was prepared and or who surveyed the land.
 37. In cross he stated that on 9/7/98 he was 17 years 8 months. On 3/2/12 the full payment of Kshs 161,000/- was paid being stand premium which amount was less than the sum of Kshs 161,990/ stated in the Letter of Allotment. He confirmed the utilities on the suit land may have been installed in 2007/2008. That he paid for land rent for the property.
 38. On the Deed Plan he indicated that his mother had the original Deed Plan but got lost at some point. On the basis of an affidavit sworn on 7/10/2010, the deed plan was reissued. There was no application for the land; no certificate of lease was prepared but a title was issued since the title was under the Registration of Titles Act (RTA) registration regime and not the Registration of Lands Act (RLA) hence a lease was not necessary.
 39. He stated that in 2013 he visited the plot and found buildings on the land that may have been erected in 2007/2008. He stated that by the time the title was issued to him he had attained the age of majority.
 40. DW3 – Wilson Kiragu Kamau stated that he is a licensed Surveyor in private practice since 2000. He relied on his witness statement dated the 23/10/24. He produced documents marked as DEX No 40-42. The Director of Surveys issued an approval for parcels 4953/4221-4223 on 15/2/2002.



He could not confirm if the sum of Kshs 3000/- was receipted. He was instructed to carry out the survey by the 2nd Defendant, James Chege Gitonga and Francis Kinyua Ngugi, who were the allottees of the three parcels. According to his witness statement he indicated Kennedy Maranga while in his testimony in the Criminal case (Cr 606 of 2015) he stated that it is James Chege Gitonga who instructed him. On 27/2/2002 he instructed the Director of Survey to release the approved Deed Plans to the Commissioner of Lands (COL). He prepared the deed plan which in his opinion was released to the COL for title preparation.

41. In cross-examination he stated that the Deed Plan annexed to the title is a copy. He does not know the whereabouts of the original. He was not consulted on the lost deed plan. He explained that for a replacement of the deed plan, the land owner must present a police abstract, particulars of the owner, ID and the Surveyor who prepared the deed plan must give a letter of no objection to the Director of Survey.
42. DW4- Catherine Njeri Maranga testified and relied on her witness statement dated the 11/11/2019.
43. She stated that she was introduced to the land by a Physical Planner named Njau who worked at the Lands office. Without producing evidence, she stated that she applied for the land in the name of her son, the 2nd Defendant who was then a minor. She paid stand premium in the sum of Kshs 161,990/0 on 23/12/2002. Stand premium was paid outside the stipulated time, 2 years later. She paid twice, that is Kshs 28,000/- but the file got lost and when it was found she paid Ksh. 161,000/-. She however never complained about the missing file nor produced any evidence to show that the file was lost.
44. With regards to the survey of the property she stated that Chege , one of the allottees instructed the surveyor to subdivide the land into three portions in the year 2000. The deed plan got lost in 2008 or thereabouts and Kennedy swore an affidavit to that effect. Equally the file got lost as early as 2006. She indicated that she has many land cases pending in Court, some with criminal charges.
45. She informed the Court that file No 208924 belongs to the 2nd Defendant. She stated that the land is occupied by people unknown to her and she is not aware if they have connected utilities.
46. That marked the close of the 1st and 2nd Defendants' case.
47. The 3rd and 4th Defendants closed their case without calling any witness.
48. DW5 – John Kibugi Ngene stated that he is the 1st Interested Party and was testifying on behalf of the rests of the Interested Parties and relied on his witness statement dated the 30/7/23 and produced documents marked as DEX No 43-52 in support of their case.
49. He stated that he represents the Interested Parties who number 24 and who are in occupation of the suit land. Those with permanent structures are 7 being residential and commercial nature. He bought the land from the Jawanga Agencies, owned by Ngacha/1st Plaintiff based on a survey plan, deed plan and minutes from Kiambu County approving subdivision. No due diligence was done to establish if the seller held a title for the land. Based on the documents obtain from Ngacha they obtained building approvals from Thika Municipal Council constructed the plots and occupied todate.
50. With that, the Interested Parties closed their case.

The Written Submissions

51. The Court has had a chance to read the submissions and considered them in its determination.



Analysis and Determination

52. Having considered the pleadings, the evidence adduced at the hearing the written submissions and all the material placed before the Court the following issues fall for determination;
 - a. Whether the 1st Plaintiff has established a claim to the suit land
 - b. Whether the 1st and 2nd Defendants have established a claim to the suit land
 - c. Whether the Interested parties are entitled to the suit land as bonafides purchasers
 - d. What orders should the Court issue?
 - e. Who meets the cost of the suit?
53. Before delving on the issues above, it is apt to discuss the background leading to the suit.
54. The genesis of the dispute is traced to unalienated vacant Government land measuring approx.10 acres or thereabouts abutting the Thika – Garissa Highway in the then Thika Municipality, a thriving commercial and industrial hub in Kiambu County.
55. At the dawn of the Millennium (1998 to be precise) it is averred that three employees of the Ministry of Lands namely James Chege Gitonga (now deceased), Francis Kimani Ngugi and Francis Mamwaka Muli (Mamwaka/Muli) allegedly successfully applied for allocation of the said land marked as Plots A, B & C respectively on the PDP on page 79 of the Plaintiff's bundle. The trio worked at various departments being; Gitonga, the cartographer (records office), Ngugi at the survey and Muli was the Land Officer in charge of Thika Region. Muli being the land officer signed the three letters of allotments, his included.
56. Armed with the letters of allotment, they caused the land to be surveyed in 2002 and each got a deed plan for land reference numbers; 4953/4221, 4222 & 4223. The subject of this suit is land Ref N. 4953/4223, originally plot No C.
57. Come 2006, Muli allegedly "sold" his parcel to James Ngacha Nganga for a consideration of Kshs. 1 Million vide a sale agreement dated the 13/10/2006. Muli is said to have handed over the original deed plan No 240607 dated 13/2/2002, allotment letter dated 9/7/98, a copy of his Identity card (ID), Survey Plan. Perhaps in an attempt to perfect the documents, Muli issued Nganga with a letter of allotment but backdated to 9/7/98. In addition, an informal transfer was executed by the duo although there is no evidence that stamp duty and consent fees was paid on the document. Muli pointed out the land to Nganga who took possession forthwith. To bolster his ownership status, Muli took Nganga to the Lands offices and showed him the correspondence file No 208924 which contained the plot documents including the allotment letter counterpart.
58. Thereafter Nganga approached the Thika Municipal Council and "registered" the land in his name. He obtained subdivision approvals and the land measuring 1.056 Ha or 2.6 acres was subdivided into 30 plots. From the year 2006, he sold 21 plots to third parties, the Interested Parties, included and retained 9 plots for himself. The 1st Plaintiff, a pastor, was "blessed" with one plot by the Ngangas'. Some of the purchasers have developed their plots and live on the suit land. Nganga too developed a commercial unit on rentals.
59. In 2008 Nganga set out to comply with the terms and conditions of the letter of allotment wherein he accepted the conditions and paid stand premium vide a cheque dated the 9/9/2008. It is averred that the embargo on processing new grants led to the delay in processing the title. It was also averred that the file at the land's office could not be traced forcing him to raise another cheque in 2012 as the previous



one had become stale. In 2012 he discovered that the title had been issued to the 2nd Defendant. He filed a complaint with the CID. As things turned out, Muli and Nganga were arraigned in Court and charged in CR N0 606 of 2015 for various offences.

60. The Plaintiffs seek orders inter alia of cancellation of the title in the name of the 2nd Defendant for having acquired it through fraud.
61. The 1st Defendant contends that she was introduced to the land by a Physical Planner named Njau. That along with Gitonga and Ngugi they successfully procured allotment of plot Nos A, B & C respectively. That plot No C was allocated to the 2nd Defendant who was then a minor. She further contends that Gitonga was left to procure the survey of the land which finally led to the issuance of deed plans dated the 13/2/2002 for Land reference Numbers 4953/4221-4223. That despite the embargo on new grants, the 2nd Defendant complied with the terms and conditions of the allotment and paid the necessary stamp duty in 2012 and procured a title on 23/11/2012. She visited the suit land and found that the Plaintiffs and other third parties were in occupation and some had developed permanent houses. The 1st and 2nd Defendants have pleaded fraud against the Plaintiffs and seek inter alia declaratory orders that they are the owners of the land, vacant possession and in the alternative compensation for the property at market rates.
62. The Interested Parties' claim is that they are bonafide Purchasers for value who bought the portions excised from the suit land between 2008- 2010 from Nganga. They claim titles for their plots from the 2nd Plaintiff.
63. From the above background it is not in dispute that the parties have put forth their competing interests on the suit land, that the Plaintiffs, the 1st and 2nd Defendant and the Interested Parties.
64. It is a settled principle of law that he who alleges must prove. Sections 107 and 109 of the Evidence Act, Cap 80 Laws of Kenya which provides as follows: -

“ 107. Whoever desires any Court to give judgment as to any legal right or liability dependent on facts which he asserts must prove that those facts exist.” 109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that proof of the fact shall lie on any particular person.”

65. The burden of proof therefore rests upon the Plaintiffs, the 1st and 2nd Defendants and the Interested Parties to establish their claims.
66. In a situation like in this case, the Court when faced with two claims over the same title has to make an investigation to determine which of the claims are valid and pass muster of the law.
67. In the case of *Hubert L. Martin & 2 Others Vs Margaret Kamar & 3 Others* [2002]eKLR the Court when faced with the same facts had this to say:

“ A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have



a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

Whether the 2nd Plaintiff has established a claim to the suit land

68. As set out above, it is not in dispute that Muli was allocated plot No C which upon survey became Land Reference Number 4953/4223. The said letter of allotment dated the 9/7/1998 was issued subject to and that the grant will be made under the provisions of the Government Lands Act (cap 280) and the title issued under the Registration of Lands Act Cap 281 or Registered *Land Act* Cap 300. The allotment required the allottee to tender an acceptance of the conditions of the allotment in writing accompanied with a banker's cheque for the sum of Kshs 161,990/- being stand premium interalia. If acceptance and payment respectively are not received within 30 days from the date of the letter the offer contained therein will be considered to have lapsed.
69. A letter of allotment has been variously described by our Courts as an offer, an invitation to offer which is conditional to the acceptance of the terms and payment of consideration stated in the Letter of allotment. It is an offer that is time bound. If not accepted the offer lapses. Period.
70. Recently the Supreme Court in the case of *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) has now settled the matter when it stated as follows;
- “An allotment letter was incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated. An allottee, in whose name the allotment letter was issued, had to perfect the same by fulfilling the conditions therein. Those conditions included but were 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 fulfilment of the conditions stipulated therein, an allottee could not pass a valid title to a third party unless and until he acquired title to the land through registration under the applicable law. It was the act of registration that conferred a transferable title to the registered proprietor, and not the possession of an allotment letter.
- An allotment letter in and by itself, was incapable of conferring a transferable title to an allottee. The holder of an allotment letter was incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he became the registered proprietor of the land consequent upon the perfection of the allotment letter. It mattered not therefore that the allotment letter had not lapsed.”
71. In this case it is not in dispute that Muli failed to comply with the terms of the allotment by accepting the letter and paying stand premium and ground rent within the stipulated 30 days nor did he perfect title in the suit land. The act of selling the land to Nganga was therefore an act in futility. The letter of allotment dated 9/7/1998 did not confer any interest to Muli let alone any interest capable of being conveyed to Nganga. Nganga therefore received nothing from Muli. The sale agreement executed by Nganga and Muli was null and void and of no legal effect.



72. I agree with the words of Lord Denning in the case of Benjamin Leonard Mcfloy – vs – United African Company Limited (UK) (1962) AC 152, when he stated as follows;
- “If an act is void, then it is in law a nullity. It is not only bad ...and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
73. I find that the letter of allotment dated the 9/7/98 did not confer any interest to Muli. Muli therefore transferred nothing to Nganga.
74. It has been averred that Nganga was issued with a letter of allotment in his name in 2006 albeit backdated to 1998. The act of backdating the letter of allotment in itself puts the said documents into doubt as to its legality.
75. That said even if for argument sake the said letter was taken to have been issued regularly, it is not in dispute that it was subject to the acceptance of the offer, fulfilment of the same terms within the timelines stipulated therein as well as perfection into a title. It is a fact that Nganga did not comply with the terms within 30 days of 9/7/98 or 2006. Evidence was adduced that Nganga attempted to comply in 2008, about 10 or 2 years later. It is also not disputed that Nganga did not perfect the allotment letter upto the issuance of a title. There was therefore no interest that accrued to Nganga on account of the letter of allotment. Further there was no evidence laid before this Court to show that the offer was renewed or extended.
76. The Court finds that the Plaintiffs have not established title in the suit land.

Whether the 1st and 2nd Defendants have established a claim to the suit land

77. Turning back to the Counter-claim, the 1st and 2nd Defendants claim ownership of the suit property pursuant to Grant Number I.R. 1411554 for LR No. 4953/4223 registered in the name of the 2nd Defendant. They therefore seek a declaration that the 2nd Defendant is the lawful owner of the suit property and an order directing the Plaintiffs and any other person in possession thereof to vacate the property.
78. It is settled principle of law that when a party’s title to land is called into question, the Party has an obligation to show the root of its title. See the case of Munyu Maina...Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009, where the Court of Appeal held that: -
- “We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
79. Have the 1st and 2nd Defendants proven the root of their title? The 1st and 2nd Defendants allege that the 1st Defendant applied for allocation on behalf of the 2nd Defendant. That the Commissioner of Lands accepted the application and allocated the suit property, which was not surveyed, to the 2nd Defendant. It was their position that subsequently, a Letter of Allotment dated 9/7/1998 was issued to the 2nd Defendant. Later the property was surveyed and a Land Reference number issued thereof.



80. Further, it is not in dispute that the 2nd Defendant was a minor at the time of allocation. Section 69 of RTA provides as follows;

“69. Where any person who, if not under disability, might have made any application, given any consent, done any act or been party to any proceeding under this Act is a minor, idiot or lunatic or of unsound mind, the representative of that person, or if there is no representative then a person specially appointed by the Court to represent that person for the purpose of this Act, may make such application, give such consent, do such act and be party to such proceeding as that person, respectively, if free from disability, might have made, given, done and been party to, and shall otherwise represent that person for the purpose of this Act. (emphasis mine).

81. Further section 47 (1) of the *Land Registration Act* provided that;

“the name of a person under the age of eighteen years may be entered in the register to enable the minor’s interest to be held in trust and shall be registered under the name of the guardian either on first registration or as a transferee or on transmission.”

82. It is a basic principle of law of contract that a minor has no legal capacity to enter into a binding contract, except if it is for his necessities. It was readily acknowledged by the 1st and 2nd Defendants that the 2nd Defendant was a minor at the time the allotment letter was issued to him.

83. DW 1 testified in cross examination by the 3rd and 4th Defendants’ Counsel that the issuance of the letter of allotment to the 2nd Defendant in his personal capacity as a minor was unprocedural and illegal. In cross-examination by Counsel for the Plaintiffs, the Witness stated that the word ‘minor’ must be indicated before the name of the allottee. He confirmed that the same was not done in respect to the 2nd Defendant’s Letter of Allotment nor were orders obtained to allow the 1st Defendant to hold the interest in trust.

84. In the case of *Re Hea (minor)* [2019] eKLR, cited by the 3rd and 4th Defendants, the Court found that the child who was of minority age could not enter into the transaction or give consent. The Court further restated that a minor was capable of holding title to land through a trustee.

85. It cannot be gainsaid that a letter of offer bears the offer that becomes the foundation of any legal rights that will accrue to the allottee if acceptance and payment are complied with. The Letter of Allotment issued in the name of the 2nd Defendant having been irregular, it follows that the subsequent processes and or documents had no basis and were equally void. As stated by DW 1, where it is not indicated that the allottee was a minor, it follows that the land was acquired by misrepresentation.

86. To the extent that the 1st Defendant failed to disclose the status of the 2nd Defendant at the time of allotting the land and further failed to obtain a Court order mandating her to stand in the position of the 2nd Defendants guardian/trustee, I find that the letter of allotment was procured irregularly and through misrepresentation. The 1st Defendant misrepresented this fact to the authorities so much so that a person devoid of legal capacity was alienated land contrary to the law. The Court finds that the letter of allotment did not disclose that the 2nd Defendant was a minor. The letter of allotment being an offer, I find that the 2nd Defendant did not have the legal capacity to contract with the Government with respect to the allocation of the suit land. The foundation/root of the title having been tainted, I find that the same cannot found a valid title.



87. The signature of Mr. Francis Mamwaka, the alleged Executor of the Letter of Allotment to the 2nd Defendant has been challenged. There are three different Reports by Document Examiners; two of whom arrived at a similar conclusion that the said signature was forged whereas one held a different view that in deed Francis signed the Letter of Allotment hence authentic. That being the case, I have to consider other evidence on record in determining whether the 2nd Defendant procedurally obtained the title to the suit property. In holding so, I am guided by the Court of Appeal case of Kenya Ports Authority -vs- Modern Holdings [E.A.] Limited [2017] eKLR; Civil Appeal No. 108 of 2016 (Mombasa) where the Court held that:

“We agree with the learned Judge that in the event of conflicting expert evidence, it is the duty of the Court to consider the evidence and form its opinion. However, in so doing, the Court must give cogent reasons why it prefers the evidence of one expert over the other.”

88. In the evidence adduced at the criminal proceedings which was admitted in this Court, Francis averred that he did not sign the letter of allotment for the 2nd Defendant. This evidence was not controverted. Further Gitonga also led evidence that he, Chege and Francis were allocated the suit land. That the 1st Defendant was later introduced to her by Ngugi for purposes of helping them fastrack the processing of title. There was no mention of the 1st or 2nd Defendant as a co-allotee of the 10-acre parcel of land. This evidence taken with the evidence of the two documents examiners, the Court finds that it is doubtful that the letter of allotment was executed by Francis and therefore is a forgery. This cast a heavy cloud of doubt on the authenticity of the letter of allotment in the name of the 2nd Defendant.

89. The 1st and 2nd Defendants’ adduced a part development plan (PDP) that is similar in all respect to the one held by the Plaintiffs but not registered, that is to say it has no definite number.

90. Section 4 of the Repealed Physical Planning Act cap defined physical planning as :

“short-term plan” means a local physical development plan which elaborates in detail policies and proposals in relation to precise areas of land, and which provides the basis for both positive and regulatory planning to be realised within a specified period of time not exceeding 10 years and includes—(a)an action plan for comprehensive planning of areas selected for intensive change, which is to commence within a specified period, by improvement, re-development or new development, restoration and re-use of derelict land; (b)an advisory plan indicating permitted subdivision and use of land specified in such plan; (c)a subject plan for detailed treatment of a particular aspect of planning in relation to a part or the whole of a local physical development plan;(d)a part development plan indicating precise sites for immediate implementation of specific projects or for alienation purposes.”

91. The significance of a part development plan in the process of allocation and/or alienation of land was elaborated upon by the Supreme Court in the case of Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR) where the Court stated as hereunder:104.The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in Nelson Kazungu Chai & 9 others v Pwani University [2014] eKLR as follows:“...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees. 131.It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by



the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: “Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...” 105. This process is restated in African Line Transport Co Ltd v Attorney General, Mombasa, HCCC No 276 of 2003 [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot. 106. We note that the suit property was allocated to HE Daniel T Arap Moi who was not a party to the suit. The 2nd to 6th respondents on the other hand at the trial Court in the replying affidavit of Gordon Odeka Ochieng in response to ELC Petition 12 of 2017 stated that certain documents that were required to support the allocation of the suit property to HE Daniel T Arap Moi were missing. These were, “the letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land; and a Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land.” 107. We are careful to note that this Court has no jurisdiction to revisit the factual findings of the superior Courts, and we are limited to the Court’s jurisdiction under article 163(4)(a) in this case. It has not been disputed that indeed there was no evidence produced of the letter to the Commissioner of Lands seeking allocation of the suit property by the first registered owner, and there was no PDP before the survey was done. We therefore agree with the trial Court and the appellate Court that the allocation of the suit property to HE Daniel T Arap Moi was irregular”.

92. The Supreme Court in *Dina Management Limited -vs- County Government of Mombasa & 5 Others*, (Petition 8 (E010) of 2021 (2023) KESC 30 (KLR) cited with approval the Environment and Land Court decision in *Nelson Kazungu Chai & 9 Others vs. Pwani University* [2014] eKLR stated;

“...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un- alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease.”

93. The cases referred to above go a long way to show the importance of the PDP before and after the issuance of the letter of allotment. It is the very document that will show the ground position of the land, whether it is available for alienation by Government and or whether the user is appropriate. The PDP being the foundation of a letter of allotment, it has not been explained how the 2nd Defendant was issued with a letter of allotment without a valid PDP. The Court finds that this taint goes to the root of the letter of allotment thus negating its validity.
94. Did the 2nd Defendant comply with the conditions set out in the letter of allotment? First and foremost, the 1st and 2nd Defendants did not adduce evidence to prove that they formally accepted the offer within the stipulated time or at all. Further, it was their evidence that they paid a sum of Kshs. 28,000/= in 2002 but due to their financial constraints, the file was taken to the Registry. However, no evidence of such payment was adduced. They stated that they later paid Kshs. 161,000/= for Stand Premium



in 2012 when they were allowed to effect the payment after the lapse of the Government embargo that restrained payment on public land. From the Letter of Allotment, the Stand Premium was Kshs. 161,990. This means that although the 1st and 2nd Defendant purported to comply with the terms of the impugned Letter of Allotment in 2012, they did not effect a full payment of the Stand Premium within the stipulated period stated in the Letter of Allotment. There is no evidence to show that the letter of allotment was renewed or reissued by the Commissioner of Lands (COL) to afford the 1st and 2nd Defendants the opportunity to comply. For purposes of compliance the letter of offer was to be accepted and paid for by 7/10/1998. By 2012 there was no subsisting offer capable of acceptance by the 1st and 2nd Defendants. To that extent, I find and hold that there was no valid letter of offer for the 2nd defendant to purport to comply, the same having lapsed on the 8/9/98, a period of 14 years.

95. I will now turn to the deed plan. It is the Plaintiffs case that the 1st and 2nd Defendants used a copy of the deed plan belonging to Nganga in processing of the title. The 2nd Defendants led evidence that the deed plan got lost and procured a certified copy of the same.
96. The *Survey Act* does not define what a deed plan is. However, it defines a plan to include a map, diagram or aerial photograph approved by the Director as suitable for survey purposes.
97. The relevant provisions of the Regulations in the *Survey Act* are as follows;

“Section 99 Deed plans to be drawn on special forms

1. Deed plans shall be drawn in waterproof ink on such forms as the Director may require, and shall be used by every surveyor.
2. Licensed surveyors shall pay to the Director the cost price of any forms supplied to them by the Director.
3. Deed plans for initial grants of Government land shall normally be prepared by the Director.
4. Printed deed plans may be used in such circumstances as the Director may decide.
5. Except where the contrary is expressly stated in the documents of the case issuing from the Commissioner of Lands, deed plans for the purpose of surrender, regrant, change of user, or consolidation, may be prepared by a licensed surveyor.
6. Regulations 44(4), 87, 88(3), 90(1), and 98 of these Regulations shall apply to deed plans.
7. The director shall specify the quality of the deed plan material to be used.

Section 100. General rules for deed plans All deed plans shall be drawn in accordance with the requirements of the Director.

Section 108. Authentication

1. Deed plans shall be prepared in duplicate. (2) One copy shall be authenticated by bearing thereon the signature of the Director or of a person authorized by him, together with the date of signature. The other copy shall bear the printed name of the



person who signed the authenticated copy, together with the date of signature and the imprint of the official seal.

2. The signed copy of every deed plan shall be deposited with the Director, and shall be the official copy, and the evidence contained in his official copy, read with the authenticated survey plan upon which it has been based, shall prevail in every case.
3. The Director may at his discretion prepare and issue a duplicate copy of a deed plan that has been mislaid or lost. Such copy shall bear the signature of the Director or of a person authorized by him, together with the date of signature and the imprint of the official seal and the words "Certified True Copy".

98. DW1 underscored the central role of a deed plan in a title when he stated that a title cannot be complete without a deed plan. That no title can be issued with a copy of a deed plan. That if the Director of Survey is satisfied that a deed is lost or mutilated, then the Director may issue a certified copy. The 2nd Defendant on the other hand led evidence that he obtained a copy of the deed plan from the Survey of Kenya as a replacement in place of the original that got lost. Though he stated that for a deed plan to be replaced one had to avail a sworn affidavit explaining the loss, a letter from the Surveyor who prepared the deed and a police abstract, he has only tabled an affidavit before the Court.
99. DW3- Wilson Kamau agreed with DW1 that for a lost deed plan the owner must apply for replacement from the Director of Survey accompanied by a police abstract, a sworn affidavit detailing particular of the owner and a letter from the surveyor who prepared the survey indicating no objection to the replacement. He stated that he was not consulted in respect to the lost title and that he did not issue any letter of no objection to the Director. That he last interacted with the deed plan in 2002.
100. DW4- Catherine Maranga explained that it is the 2nd Defendant who swore the affidavit stating that the deed plan was lost. In cross examination by Counsel for the Plaintiffs she conceded that the deed plan annexed to the title was not certified. She stated that she does not know how a deed plan is certified and all she is aware is that she received the copy of the deed plan and proceeded to process the title in the name of the 2nd Defendant.
101. The Court has perused the deed plan presented in evidence by the 1st and 2nd Defendant and notes that the same is a copy as it does not contain the words "certified true copy of the original". The Court finds that the deed plan does not comply with the provisions of Section 108 (4) of the Regulations which require that it should bear the signature of the Director, date of the signature and the words certified true copy imprinted on it. (emphasis is mine).
102. In conclusion I agree with the decision of the Court in of Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR the Court of Appeal stated as hereunder:
- “ 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.”
103. Looking at the Plaint, the Court is satisfied that particulars of fraud have not only been pleaded but particularised under para 13 of the Plaint.



104. As duly stated by DW 1, a valid title cannot be issued without a valid Deed Plan. In the absence a valid Letter of Allotment and subsequently a valid Deed Plan, the 2nd Defendant's title was therefore not procedurally acquired. The 2nd Defendant therefore lacks a good title.
105. With the risk of repetition, the case against the 1st and 2nd Defendants was that they acquired the land through fraudulent means. The 1st and 2nd Defendant have attempted to exonerate themselves and urged the Court that they acquired a valid letter of allotment that was the basis of the issuance of the title held by the 2nd Defendant.
106. It is settled law that the Court cannot infer fraud. Fraud must be pleaded and particularised in the pleadings. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, the Court stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

107. The standard of proof in matters fraud was settled by the Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR when it expressed itself as follows; -

“... It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “... We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...” ...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

108. Without a good title, the 1st and 2nd Defendants have no justifiable claim over the suit property. The Court finds that fraud was proven.

109. Consequently, their Counter-claim fails. It is therefore dismissed.

Whether the 2nd Defendant's Title should be impeached.

110. It is not disputed that the 2nd Defendant is presently the registered proprietor of the suit property.

111. Indefeasibility of the title is provided for in Section 26 (1) (b) of the *Land Registration Act* which states;

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
112. Section 26 of the *Land Registration Act* is explicit that a title of a proprietor may be challenged where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
113. In the case of *Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR, the Court elaborating on the provisions of section 26 held that: -
- “... the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”
114. The Court of Appeal in the case of *Munyu Maina vs. Hiram Gathiha Maina* (2013)eKLR pronounced itself as thus;
- “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 challenged 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.”
115. Further in the case of *Kassim Ahmed Omar & Another vs. Anwar Ahmed Abed & Others*, Malindi ELC No. 18 of 2015 the Court held that;
- “A certificate of title is not an end process. If the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the Court.”
116. Having found and held that the Certificate of title held by the 2nd Defendant was procured unprocedurally and through fraud and therefore null and void, the Court must then determine whether it is in a position to cancel the said title.
117. Section 80(1) of the *Land Registration Act* comes into play. It provides: -
- “Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
118. This Court is satisfied that the Certificate of title held by the 2nd Defendant was procured illegally and as such it is impeachable. Article 40(6) of *the Constitution* does not accord protection (of the right to property) to a property that has been found to have been unlawfully acquired. Consequently, the title held by the 2nd Defendant ought and must be cancelled and/or revoked.

Whether the IPs are entitled to the suit land as bonafides purchasers

119. The definition of a bonafide purchaser for value without notice was given in the case of *Lawrence Mukiri v. Attorney General & 4 Others* [2013] eKLR thus:
- ... a bona fide purchaser for value is 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 the following:



- a. He holds a certificate of Title.
 - b. He purchased the Property in good faith;
 - c. He had no knowledge of the fraud;
 - d. The vendors had apparent valid title;
 - e. He purchased without notice of any fraud;
 - f. He was not party to any fraud.
120. A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner. In this case the Interested parties claim a purchaser's interest from the Plaintiffs. The IPS have not shown any diligence that they deployed before purchasing the property. If they had inquired about the status of the land they would have discovered that the Plaintiffs held no interest in the land.
121. I cannot agree more with the description of the Court in *Rajab Ahmed Karume Vs The Chief Registrar & 6 others* [CA No E5050 of 2020](#) where Kiage JA described an invalid letter of offer as a barren mirage void in law and incapable of passing a viable title. Sadly, this is what admittedly the Interested parties relied on in their quest to acquire of the plots.
122. I find and hold that the claim of the 1st Plaintiff and the IPs is anchored on quick sand. It is dismissed.

What orders should the Court issue?

123. Having found that none of the parties acquired a valid interest, and or title in the suit land, this Court finds that the land remains public land in accordance with the provisions of Art 62 of the COK which states as follows;
62. (1) Public land is— (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date; (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease; (c) land transferred to the State by way of sale, reversion or surrender; (d) land in respect of which no individual or community ownership can be established by any legal process; (e) land in respect of which no heir can be identified by any legal process; (f) all minerals and mineral oils as defined by law; (g) government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas; (h) all roads and thoroughfares provided for by an Act of Parliament; (i) all rivers, lakes and other water bodies as defined by an Act of Parliament; [Constitution of Kenya, 2010](#) 43 (j) the territorial sea, the exclusive economic zone and the sea bed; (k) the continental shelf; (l) all land between the high and low water marks; (m) any land not classified as private or community land under this Constitution; and (n) any other land declared to be public land by an Act of Parliament— (i) in force at the effective date; or (ii) enacted after the effective date. (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under— (a) clause (1) (a), (c), (d) or (e); and (b) clause (1) (b), other than land held, used or occupied by a national State organ. (3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land



Commission. (4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.”

Costs

124. Costs follow the event and am guided by the provisions of Section 27 of the Civil Procedure Act states which state as follows;

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order.”

125. In this case all the parties have failed to proof their claims. I order each to meet their costs.

126. Final orders for disposal

- a. The Plaintiff’s case fails. It is dismissed.
- b. To avoid any mischievous use of the deed plan No 240607, It is hereby declared that the said Deed plan stands cancelled accordance with section 109 of the Survey Regulations, the Survey Act. The Director is Survey is ordered to so recall it for purposes of cancellation and destruction, in default it stands cancelled.
- c. The Counterclaim of the 1st and 2nd Defendants is unmerited. It is dismissed.
- d. The title held by the 2nd Defendant being LR No 4953/4223, IR No 1411554 be and is hereby declared null and void and hereby stands cancelled and of no effect.
- e. For purposes of clarity, the letter of allotment issued in the name of the 2nd Defendant dated the 9/7/1998, the purported part development plan (PDP), the copy of the deed plan and all the documents that may have been used to prepare the cancelled title above be and are hereby declared null and void and of no legal effect
- f. For effect the Chief Land Registrar be and is hereby ordered to effect their cancellation forthwith.
- g. Each party to meet their own costs.

127. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JULY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the Presence of:

1. Mr. Muriuki for the Plaintiff



2. Mr. Kamau for the 1st and 2nd Defendants
3. Ms. Ndundu for the 3rd and 4th Defendants
4. Mr. Macharia for the Interested Parties
5. CA- Ms. Yvette Njoroge

