



**Imili v Wakhungu & 2 others (Environment and Land Appeal E007 of 2024)
[2025] KEELC 873 (KLR) (Environment and Land) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 873 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E007 OF 2024
MC OUNDO, J
FEBRUARY 27, 2025**

BETWEEN

JAMIN LUDONDE IMILI APPELLANT

AND

SIMON OKOKO WAKHUNGU 1ST RESPONDENT

LAND REGISTRAR NAIVASHA 2ND RESPONDENT

THE HON ATTORNEY-GENERAL 3RD RESPONDENT

(Being an Appeal from the Judgement/order of Hon. Yusuf Barasa Mukbula dated and delivered in Naivasha on the 21st of June 2024 in MCELC 104 of 2019)

JUDGMENT

1. Before me for determination on Appeal is a matter which was heard and determined by Hon. Y.M Barasa, Principal Magistrate wherein upon considering the evidence of both parties, vide his Judgment dated 21st June, 2024, the learned Magistrate entered judgment in favour of the Plaintiff declaring him as the bona fide owner and proprietor of the plot No. 1464 Oljorai Phase II Settlement Scheme measuring approximately 2.02 Hectares. A permanent injunction was issued against the Defendant whether by himself, his agents and/or servants from interfering with the said parcel of land. Costs were also awarded to the Plaintiff. I
2. The Appellant, being dissatisfied with the Judgement and Decree of the trial Magistrate has now filed the present Appeal based on the following grounds in his Memorandum of Appeal:
 - i. The Learned Magistrate misdirected himself and erred in law and in fact by failing to appreciate the totality of the evidence tendered that there was no valid sale agreement between the parties



as the sale agreement dated 13th March, 2012 was not drawn by the alleged author, Advocate Gachiengo Gitau.

- ii. That the Learned Magistrate erred in law and fact by failing to take into account the evidence and testimony of the Advocate Gachiengo Gitau in respect to the validity and authenticity of the Sale Agreement dated 13th March, 2012.
 - iii. The Learned Magistrate misdirected himself by relying on the evidence of the Plaintiff's witnesses that the sale agreement dated 13th March, 2012 was drawn and executed by Advocate Gachiengo Gitau.
 - iv. The Learned Magistrate erred in law and fact by failing to consider the absence of evidence that a surveyor visited the suit property on the 19th March, 2012 and demarcated 2 acres from the same.
 - v. The Learned Magistrate erred in law and fact by failing to consider that there was no evidence of payment of the purchase price by the Plaintiff to the vendor in respect of the suit property.
 - vi. The Learned Magistrate erred in law and fact by failing to take into account that there was no evidence that the vendor's wife received a portion of the purchase price on 19th March, 2012.
3. The Appellant thus sought that the instant Appeal be allowed with costs, the judgment and order appealed against set aside and that the court makes order(s) that it may deem fit to meet the ends of justice.
 4. Wherein directions were issued for the Appeal to be disposed of by way of written submissions, only the Appellant and the 1st Respondent complied for which submissions I shall summarize as herein under.

Appellant's submission

5. After summarizing the factual background of the matter, the Appellant placed reliance on the decided case of *Selle v Associated Motor Boat Co. Ltd*(1968) EA 123, 126 to submit that the instant matter being a first appeal, the court was empowered to examine the record, re-evaluate, re-assess and re-analyse the available evidence and then come up with its own conclusion, while bearing in mind that it neither saw nor heard the witness. The Appellant then framed his issues for determination as follows:
 - i. Whether there is a valid sale agreement dated 13th March 2012 to convey the suit property to the 1st Respondent.
 - ii. Whether the Appellant is entitled to the prayers sought in the Memorandum of Appeal.
6. On the first issue for determination as to whether there was a valid sale agreement dated 13th March, 2012 that had conveyed the suit property to the 1st Respondent, the Appellant submitted that pursuant to the 1st Respondent's averments in his Plea that he had entered into a sale agreement dated 13th March, 2012 with one Kisenge Sahani for the purchase of two acres of land within plot No. 1464 Ol Jorai Phase II Settlement Scheme, wherein they had executed the said agreement at the offices of Advocate Gachiengo Gitau and had thereafter taken possession of the suit property upon the survey being done, that the said Kisenge Sahani was his father and that at no time had he sold the suit property hence the sale agreement thereto was questionable.
7. That Counsel Gachiengo Gitau, an Advocate of the High Court of Kenya alleged to have drawn and executed the impugned Agreement for sale herein had neither drawn the said agreement for sale nor witnessed execution of the same and the said agreement had not originated from his office but had been a forgery as the stamp affixed thereto had not been his.



8. The Appellant relied on the provisions of Section 3(3) of the Law of Contract Act as well as on the decided case of Jane Catherine K. Karani v Daniel Mureithi Wachira [2014] eKLR to submit that it was trite law that a contract over land that did not satisfy the requirements of the said provisions was unenforceable. That the 1st Respondent herein not having adduced evidence as to the authenticity and veracity of the impugned sale agreement herein, the same had not been attested to by a witness as provided for under the provisions of section 3(3) of the Law of Contract Act and therefore was not valid. It was thus his submission that there had been no evidence of a sale having taken place between the vendor and the 1st Respondent to warrant the reliefs that had been sought for and granted in the Judgement dated 21st June, 2024.
9. On the second issue for determination as to whether the Appellant was entitled to the prayers sought in his Memorandum of Appeal, his submission was in the affirmative to the effect that the 1st Respondent having failed to prove the existence of a sale agreement between he and the vendor, the said 1st Respondent was not deserving of the prayers sought in his Plaint hence that judgment ought to be set aside. He prayed that the trial court's judgment of 21st June, 2021 be set aside and the instant Appeal allowed with costs.

1st Respondent's Submissions.

10. In response to the Appellant's Appeal and in opposition thereto, the 1st Respondent vide his written submissions dated 18th November, 2024, summarized the factual background of the matter before framing one issue for determination to wit; whether the sale agreement dated 13th March, 2012 was valid.
11. His submission was that he had entered into an agreement with the Appellant's father, who was now deceased, for the purchase of a portion of land (the suit property) measuring 2 acres, which was to be hived off from a 5-acre parcel of land. That the said agreement had been reduced into writing and was attested to by both parties.
12. He placed reliance on the provisions of Section 3(3) of the Law of Contract Act to submit that the impugned agreement for sale that had been adduced as an exhibit in court had satisfied the criteria of a valid sale agreement under the said provision since it contained the names of the parties, the description of the property, the purchase price and the conditions thereto. That the Appellant on the other hand, who had been the 1st Defendant in the trial court had informed the court that his deceased father had made an oral agreement transferring the suit property to him. That the alleged oral agreement had been contrary to the provisions of Section 3(3) of the Law of Contract Act which required that contracts on disposition of an interest in land be in writing.
13. That whereas Mr. Gachiengo had not drawn the impugned agreement for sale, he had testified before the trial court that he had a law firm in Nairobi and Naivasha and that he could not inform the court whose signature had been appended on the said agreement on his behalf. It was thus his submission that the impugned agreement had been drawn by the branch firm in Naivasha belonging to Mr. Gachiengo. That in any case, the said Mr. Gachiengo had not brought sample signatures of his staff to dispute the same. Reliance was placed on the decision in the case of Sammy Some Kosgei v Grace Jelel Boit [2013] eKLR to submit that the sale agreement dated 13th March, 2012 was a valid and authentic agreement.
14. In conclusion, he urged that the instant appeal be disallowed with costs and the judgement appealed against be upheld.



Analyses of the evidence.

15. I have considered the record of Appeal, the holding by the trial Magistrate, the written submissions by learned Counsel and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against, assess it and make my own conclusions as was stated by the Court of Appeal in *Paramount Bank Limited vs. First National Bank Limited & 2 Others* (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) where the court held as follows;
- “A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”
16. According to the proceedings, the 1st Respondent herein instituted the suit against the Appellant, the 2nd and 3rd Respondents herein in CMCELC No. 104 of 2019 vide a Complaint dated 29th November, 2019 wherein he had sought for the following orders;
- i. An order of permanent injunction restraining the 1st Defendant herein whether by himself, his agents and/or servants from invading, trespassing, grazing, cultivating or in any way whatsoever interfering with the Plaintiff's quiet possession and use of two (2) acres of land excised from Plot No. 1464 Oljorai Phase II Settlement Scheme in Naivasha District measuring approximately 2.02 Hectares which is currently in possession of the Plaintiff.
 - ii. A declaration that the Plaintiff herein was and still remains the bona fide owner and proprietor of two (2) acres of land excised from Plot No. 1464 of Oljorai Phase II Settlement Scheme in Naivasha District measuring approximately 2.02 Hectares which is currently in possession of the Plaintiff.
 - iii. An order that the 2nd Defendant do rectify the Register by cancellation of the current title for all that parcel of land known as Plot No. 1464 Oljorai Phase II Settlement Scheme in Naivasha District measuring approximately 2.02 in the name of Jamin Lidonde and any further subdivisions resulting therefrom.
 - iv. Costs of this suit.
 - v. Interest on (iv) above at Court's rates.
 - vi. Any other or further relief that the Honourable Court may deem fit and just to grant.
17. Subsequent to the filing of the suit, the 1st Defendant/Appellant filed his Defence dated 9th February, 2021 wherein he denied the allegations contained in the Complaint putting the Plaintiff to strict proof while stating that his late father, one Kisenge Sahani, had been allocated Plot No. 1464 measuring 2.02 hectares at Oljorai Phase II Settlement Scheme in Naivasha (suit property) vide a letter of allotment dated 16th August, 2010. That the said Kisenge had been occupying and cultivating on the suit property in the year 2012 when the Plaintiff claimed to have been in occupation of the same. That indeed, Kisenge Sahani (Deceased) had conducted an informal transfer of the suit property in his name and lodged the same at the Lands Registry in Naivasha. That he was not aware of any alleged purchase of a portion of the suit property by the Plaintiff since the alleged sale agreement dated 13th March 2012 had



failed to indicate whether consideration, if any, had been paid and that the same ought to have been supported by evidence of payment.

18. That further, he was not aware of any survey that had been conducted on the suit property and that if the same had indeed been conducted, then the it had been done without the authority of the registered owner of the suit property at the time being one Kisenge Sahani (Deceased). That subsequently, upon issuance of the title deed in his name and due to the pressing needs of his family, the 1st Defendant had disposed of portions of the suit property to various parties including Umoja Vision Self-Help Group thus the only portion of the suit property that remained measured 0.75 acres wherein the 1st Defendant's family was residing. He thus sought for the dismissal of the Plaintiffs suit with costs and judgement entered in his favour.
19. The case proceeded for hearing wherein the Plaintiff/1st Respondent adopted his witness statement as his evidence in chief and sought to produce the documents filed. He then testified as PW1 to the effect that the 1st Defendant was trying to take his land which had been sold to him by the 1st Defendant's father (Deceased), in a sale agreement dated 13th March, 2012. That the Deceased had sold to him a portion of the land in order to get money to pay the ADC rates. That unfortunately, the Deceased fell sick and died after which the 1st Defendant has requested him to assist in the burial. That the Deceased had drawn the mutation form wherein the surveyor had surveyed the land.
20. That the 1st Defendant had then told him that he had defended him when his relatives wanted to refund his money. That in the year 2018 however, the 1st Defendant had called him and demanded 1 acre out of the 2 acres. When he refused, the 1st Defendant had promised to take the same by force. That later on, when he had gone to check if the title deed was ready, he had found that the same had been registered in the name of the 1st Defendant. That what followed was a land dispute resolution wherein the village elders had concluded that land belonged to him. That he had paid the full purchase price when he entered into the sale agreement with the Deceased.
21. The Plaintiff's relied on the following filed list of documents in evidence;
 - i. A copy of sale agreement between Kisenge Sahani and Simeon Okoko Wakhungu dated 13th March, 2012.
 - ii. A copy of letter of offer addressed to Kisenge Sahani dated 1st August, 2010.
 - iii. A copy of a mutation form for all that parcel of land known as Plot No. 1464 Oljorai Phase II Settlement Scheme in Naivasha District measuring approximately 2.02 Hectares prepared by J.E W Olweny licensed surveyor.
 - iv. Letter dated 29th January, 2018 from the area chief Oljorai Location addressed to Simon Okoko Wakhungu.
 - v. A copy of OB No. for 6th May, 2019.
22. In cross examination by the Counsel for the 1st Defendant, he confirmed that he had entered into an agreement with the Deceased, and which agreement had been drafted at Advocate Gachiengo's office in Naivasha and the Advocate's stamp had been affixed in the agreement. That he had initially paid a sum of Kshs. 80,000/= and later the balance of Kshs. 10,000/= both in the presence of Advocate Gachiengo. That the deceased had a debt on rates amounting to Kshs. 12,700/=. That whereas the mutation form was undated, the land had been surveyed on a date he could not remember. That he had given the Deceased's wife a sum of Kshs. 10,000/= on 23rd March 2012 because the Deceased had gone to church. That she had then signed on surveyor's document. He confirmed that when the Deceased died, the 1st



- Defendant had contacted him to help with the burial arrangements. That there was evidence to show that he had gone and reported to the police.
23. That whereas he had seen the Will during the deceased's memorial service, which Will had stated that part of the land had been sold to him, the said Will was not in court. That the 1st Defendant had promised to protect him because the land was his. That whilst he did not have the title documents, he had the Sale Agreement to show that the land was his.
 24. In cross examination by the Counsel for the 2nd and 3rd Defendants, he stated that the portion of the suit land had been the first land that he had bought. That he had not conducted a search because the land had no title, as he had only been shown the Offer Letter. He maintained that the 1st Defendant had trespassed on his land and explained that he had sued the Land Registrar because the title to the suit land had been issued without there being Succession Proceedings conducted. That the CID had assisted him to follow up the matter. That whilst he had been told that the title to the suit property had been registered in the name of the 1st Defendant, he did not have the said title.
 25. He confirmed not having signed any transfer documents. That the Land Registrar had participated in the 1st Defendant entering upon his parcel of land and causing damage. That whereas the particulars in the Plaintiff had been against the 1st Defendant, he had sued the Land Registrar for issuing the title to the 1st Defendant. That he had written a demand letter to the Defendant and that he had a reason to sue the 1st Defendant. He maintained that the Succession Proceedings had not been done Before issuing out the title deeds which was the basis of his issue with the Land Registrar.
 26. His witness, Yusuf Hussein, testified as PW2 and also adopted his witness statement. He testified that he used to work with the Plaintiff at JB Drillings and that he also knew the Deceased. That the deceased had sold a of portion 2 acres, comprised in his land, so as to enable him pay the land rates. That he had introduced the Plaintiff to the Deceased whereupon they had agreed on a purchase price of Kshs. 45,000/= per acre. That thereafter, they had conducted a search the lands office before proceeding to the Advocate's office for the drafting of the sale Agreement which agreement he had witnessed.
 27. That upon the demise of the Deceased, the said parcel of land had been sold. That he being a village elder then, the Plaintiff had called him and inform him of the said sale after which the Deceased family and the Plaintiff had met and agreed that the land be given to the Plaintiff wherein the 1st Defendant had refused despite knowledge that the Plaintiff had purchased the land from his Deceased father.
 28. In cross examination by the Counsel for the 1st Defendant, he had testified that he had gone to the Advocate's office with the parties in his capacity as a witness although he could not remember the name of the Advocate. That the Plaintiff had paid a sum of Kshs. 88,000/= wherein the Sale Agreement had been signed by an Advocate. That whereas in the agreement it had been indicated that the seller had been paid a sum of Kshs. 80,000/=, the Deceased had a debt of Kshs. 12,000/= which the Plaintiff had paid for him. That whilst the receipt dated 13th March 2012 had indicated the name to whom the money had been paid to as Kisenge, yet it had neither indicated the amount paid nor the person who had paid the same. He testified that some money had been paid to the Deceased's wife the Deceased having gone to church. That it had been after they had found some men on the land, that they had reported to the Police.
 29. When he was cross examined by the Counsel for the 2nd and 3rd Defendants, he responded that he was not a broker but a Village Chairman to whom the Deceased had requested to get him a buyer. That the Deceased had an allotment letter and that they had gone to the lands office wherein the Deceased had paid a sum of Kshs. 12,000/= and did not pay any interest on the land rates. That he neither knew if money had been paid for the search nor why the Land Registrar had been sued.



30. In re-examination, he confirmed that a sum of Kshs. 60,000/= had been paid in cash and the balance was to be paid later.
31. PW3, Samuel Ng'ang'a also adopted his witness statement as his evidence in chief and proceeded to testify that the Plaintiff had bought land from the Deceased. He confirmed that the 1st Defendant was the said Deceased's son. That he had been called by the village elder who had then informed him that the Deceased had sold the land to the Plaintiff. That they had mediated over the issue and when the Deceased's wife demanded for more cash, the 1st Defendant had defended the Plaintiff.
32. In cross-examination by the Counsel for the 1st Defendant, he confirmed that he had not been present when the agreement was drafted but had just been informed. That whereas he had known the deceased and understood that he had a normal sickness, he was not aware that he had memory loss. That the Plaintiff had told him that he had paid a sum of Kshs. 80,000/= in the presence of an Advocate. That he had not witnessed any demolition on the land and nether had he had not known the Plaintiff before the transaction herein. That whereas he was the Village Secretary, he did not record any statement with the police. That whilst in their area an acre of land currently sold for between Kshs. 1,600,000/= to 1,800,000/=, at the time the Plaintiff had bought the land the price of land per acre had been between Kshs. 10,000/= and Kshs. 20,000/=.
33. He maintained that he did not witness the agreement. That whereas the Deceased had been his neighbor, he did not witness any crop being planted on the land. That indeed, the Deceased had a small house but he never used to cultivate his land. That whilst he had employed the Deceased in his home, he did not know the 1st Defendant. He confirmed that whereas the Deceased was the one who had built the house on the land, there had been some destructions that had been committed on the land.
34. In cross-examination by the Counsel for the 2nd and 3rd Defendants, he had reiterated that he had not been present during the drafting of the sale agreement hence he had not been involved in the transaction herein. He also confirmed no reference had been made to the Land Register in the evidence submitted in court.

The Plaintiff had thus closed his case

35. Mr. Gachiengo Gitau Advocate adopted his witness statement as his evidence in chief before testifying as DW1 where he denied the signature appearing on the Agreement for Sale as being his.
36. In cross-examination by the Counsel for the Plaintiff, he confirmed that although he ran two offices, yet he had used the same person to prepare his stamps. That whereas he had not attached a sample of his stamp and signatures, the only stamp that had been accessible was the one used for receiving documents. He confirmed that he had neither testified in a criminal matter touching on the present case nor had he recorded any statement with any authority.
37. In re-examination, he stated that whereas the postal box address appearing in the agreement was in reference to Naivasha, his address was Nairobi. He maintained that the signature in the sale agreement had not been his.
38. DW2, Jamin Lidonde Imili, the 1st Defendant/Appellant had also adopted his witness statement as evidence in chief and sought to relay on the documents filed before proceeding to testify that, plot No. 1464 measuring 5 acres initially belonged to his Deceased father one Erastus Kisenge who had acquired the same from the Settlement Scheme wherein he had been issued with an allotment letter. That whereas he was the one who had made payment, the receipt had been written in his father's name. That whilst he knew the Plaintiff whom he used to meet on the land, he was not sure whether the Deceased had sold to him the land since he had never seen any agreement to that effect. That the



Plaintiff had never occupied the land, no surveyor had ever visited the land, and neither had he seen any mutation forms. That whilst the land had been in his late father's name, he had been called and informed that the same had been fenced.

39. In his evidence, the 1st Defendant relied on his list of documents dated the 9th February, 2021 to wit;
- i. A copy of settlement plot-letter of offer dated 16th August, 2010.
 - ii. A copy of the receipt dated 13th March, 2012.
 - iii. A copy of the agreement for sale dated 17th October, 2018.
40. In cross-examination by the Counsel for the Plaintiff, he denied knowledge of one Agoi Otieno and testified that he had only known Hussein Yusuf since he had heard his testimony. That however, since he had not been involved in any transaction, he could not tell if the said Hussein had witnessed the agreement. That whilst the criminal case in Naivasha had been ongoing, he could not tell whether the sample signatures of his late father had been collected. He admitted that he had not annexed the informal transfer that he had done with his father. He confirmed that the agreement had been signed on 13th March 2012 wherein he had been issued with the receipt of an equal date. He however confirmed that he did not have any documents showing that the thumb print signature in the agreement did not belong to his late father.
41. On cross-examination by the Counsel for the 2nd and 3rd Defendants, he confirmed that he had the title deed. That whereas the land had previously been registered in his father's name, there had been nobody on the said land. That nonetheless, he did not know if the Land Registrar had been aware of the dispute between him and the Plaintiff.
42. In re-examination, he confirmed that he knew Hussein who could have been a witness in the agreement. That whereas the Advocate had denied signing the agreement, he did not have an examiner's report. He confirmed that he had made the payment but that he had not seen any transfer.
- The 1st Defendant had thus closed his case.
43. I have looked at the undated Plaintiff witness statement filed on 2nd December, 2013 wherein he had stated that in the year 2012, he had been approached by one Mr. Hussein Yusuf Sheikh Abdi who had asked if he had was interested in purchasing two (2) acres of land at Kiptangwany area within Nakuru County.
44. That the said parcel of land being Plot No. 1464 Oljorai Phase II Settlement Scheme belonged to one Kisenge Sahani (Deceased) and measured five (5) acres upon which the Deceased and his family lived. That the deceased sought to sell a portion of the 2 acres at a consideration of Kshs. 45,000/= per acre.
45. That on or about the 13th March, 2012, he the Deceased, and Hussein Yusuf Sheikh Abdi, the village elder had gone to the Land and Settlement Office in Naivasha where he had paid a sum of Kshs. 12,000/= on behalf of the Deceased which amount was a debt owed to the Land Adjudication and Settlement Department. That they had then executed a land Sale Agreement at Gachiengo Gitau Advocate's office for the sale of two (2) acres of land to be excised from all that parcel of land known as Plot No. 1464 Oljorai Phase II Settlement Scheme in Naivasha District measuring approximately 2.02 hectares belonging to the Deceased.
46. That after executing the said sale agreement and paying the required consideration, they had given a copy of the same to the Land and Settlement Office in Naivasha. That on or about 19th March, 2012, a surveyor by the name J.E. W Olweny had been granted permission by the deceased to excise the 2



- acres portion of the suit land which had then been demarcated and beacons erected to indicate the boundaries.
47. That the survey exercise had been carried out in the presence of the Deceased's wife who had also received the balance of the purchase price amounting to Kshs. 10,000/= . That after the survey exercise had been concluded, the said surveyor had filed the mutation forms after which the Plaintiff had proceeded to fence the 2 acres portion of the suit land and had also planted trees therein. Unfortunately, sometime in December, 2012, the Deceased had passed away.
 48. That during the burial of the Deceased, the Deceased eldest son, the Appellant/1st Defendant herein, had told the rest of his family members that he had been aware that his father had sold to the Plaintiff 2 acres portion of land out of his own will hence the said transaction should be honored.
 49. That sometime in the year 2015, one of his neighbors with the authority of the Appellant/1st Defendant fenced his parcel of land wherein he had encroached into one part of the Plaintiff's parcel of land. That he had then contacted the Appellant/1st Defendant wherein they had called upon a surveyor. However, the Appellant/1st Defendant had stated that the Plaintiff's parcel of land had not been affected since it did not measure 2 acres. He then sought for that information to reflect in the mutation forms.
 50. That in the year 2017, the Appellant/1st Defendant through fraudulent means acquired a title deed to the whole parcel of land known as Plot. No. 1464 Oljorai Phase II Settlement Scheme in Naivasha District measuring approximately 2.02 Hectares in his name. That on or about 29th January 2018, he had been summoned to the area Chief's office Oljorai Location on allegations that he had encroached into the Appellant/1st Defendant's parcel of land whereupon presenting his documents, the chief was convinced that he had grabbed the land.
 51. That after sometime, the Appellant/1st Defendant had removed the fence that the Plaintiff had put around his 2 acres portion of land where he had then subdivided the land into small plots. That upon realizing that the Appellant/ 1st Defendant had been sub-dividing his parcel of land, he had used a tractor to plough the same whereupon the Appellant/1st Defendant had sent him a text message threatening to kill him if he found him on the suit land. That on 6th May, 2019, he had reported the matter at the Directorate of Criminal Investigations Gilgil wherein he had been issued with an O.B Number.
 52. The Appellant/1st Defendant's witness statement recorded on the 9th February 2021, was to the effect that he was the first-born son to the late Kisenge Sahani who had been the proprietor of the suit property. That sometime in the year 2009, his father had applied for and had been allocated Plot number 1464 measuring 2.02 Hectares at Ol Jorai phase II Settlement Scheme in Naivasha District vide settlement offer. That as per the said letter of allotment dated 16th August 2010, his father was to pay a sum of Kshs. 12,755/= failure to which the amount would accrue interest and he also risked the cancellation of the said offer. That it was not until the 13th March, 2012 that the money was paid and his father issued with the receipt of payment which from the look of it, it had been evident that it had not been the Plaintiff who had paid as alleged. That at the time of payment, the Deceased had already occupied the said property wherein he resided and carried out farming activities after having fenced the entire suit property.
 53. That they then began following up on the issuance of the title deed in the Deceased name. That nonetheless, the Deceased later conducted an informal transfer and lodged the same at the requisite registry in Naivasha wherein in the year 2017, he (Appellant/1st Defendant) had been issued with a title deed as the Deceased's first-born son.



54. That thereafter, due to the pressing needs from his family, they had agreed to dispose of the suit land to various parties wherein he had on the 17th October, 2018 sold a parcel of land measuring 0.310 hectares to Umoja Vision Self-help group. That indeed, all the individuals who had purchased parcels of land from him had acquired indefeasible title deeds on the same and that there had only been remaining a portion measuring 0.75 acres where his family was residing.
55. That he was not aware of any sale agreement by the Plaintiff in respect of the suit property. That that aside, the alleged sale agreement dated 13th March, 2012 did not disclose if there had been any consideration paid. That no survey had been done on the suit property and if any survey had been conducted, then the same had been done without the authority of the Deceased who was the registered owner of the suit property.
56. That his mother had also not received any payment for or on behalf of the Deceased and neither had she been present when the alleged survey had been done. That it was apparent that this had been a well-orchestrated plan by the Plaintiff to dispose his family off their only inheritance from the Deceased.

Determination.

57. After analyzing the evidence as submitted in the trial court, I find that the 1st Respondent/Plaintiff's suit was founded on a sale agreement between him and Mr. Kisenge Sahani, the Appellant/1st Defendant's father who had sold to him a portion of 2 acres of land vide a sale agreement dated 13th March, 2012 at Ksh 45,000/= per acre. That the said portion of land was to be excised from Plot No. 1464 Oljorai Phase II Settlement Scheme in Naivasha District measuring approximately 2.02 hectares. That the 1st Respondent/Plaintiff, had facilitated the initial payment of a sum of Kshs. 12,000/= to repay the loan owed to the Land Adjudication and Settlement Department, on behalf of the Deceased. That pursuant to the execution of the agreement and payment of the purchase price, the land had been surveyed and demarcated wherein he had been put into possession while awaiting the transfer. That he then proceeded to develop the land by fencing his portion and planting trees therein. Unfortunately, sometime in December, 2012, the Deceased passed away. That it had been when he had gone to inquire over the progress of issuance of his title that he had found that the Appellant/1st Defendant had registered the whole parcel of land to himself and a title deed was issued in the year 2017 wherein he had then proceeded to subdivide the whole parcel of land into plots which he had proceeded to dispose to third parties.
58. The Appellant/1st Defendant's case on the other hand had been that indeed his deceased father had been allotted the suit parcel of land plot No. 1464 measuring 5 acres by the Settlement Scheme wherein he had been issued with an allotment letter dated 16th August 2010. That on the 13th March, 2012 his father paid Kshs. 12,755/= and was issued with the receipt. That he had been seeing the 1st Respondent/Plaintiff on the land but was not aware of any sale agreement between him and his father. He disputed the sale agreement produced by the 1st Respondent/Plaintiff in evidence although he was not sure whether or not the thumb print appearing thereon in execution of the agreement belonged his father. That after his father passed away, the suit land had been transferred and registered to him as the first-born son.
59. From the summary of the matter in issue the following issues were not contested.
 - i. That Erastus Kisenge Sahani was the father to the Appellant/ 1st Defendant and that he had passed away sometime in December 2012.



- ii. That the suit parcel of land being Plot No. 1464 Ol Jorai phase II Settlement Scheme in Naivasha District measuring 2.02 Hectares was allocated to Erastus Kisenge Sahani by the settlement scheme vide a letter of allotment dated 16th August, 2010.
 - iii. That pursuant to the allotment of the suit parcel of land, Erastus Kisenge Sahani owed Kshs. 12,755/= to the Settlement scheme which money was subsequently paid.
 - iv. That the time of his death, Erastus Kisenge Sahani did not have a title to the suit parcel of land.
 - v. That pursuant to the passing away of Erastus Kisenge Sahani, his son the Appellant/1st Defendant herein obtained title to the whole parcel of land wherein he started subdividing and disposing off portions of the same.
60. What is in contention is whether there was a sale agreement on the 13th March, 2012 between Erastus Kisenge Sahani and the 1st Respondent/Plaintiff for the sale of a portion of two acres of land to be excised from Plot No. 1464 Ol Jorai phase II Settlement Scheme in Naivasha District.
61. With this said, I find the issues herein arising for determination as follows;
- i. Whether the letter of allotment conferred proprietorship to the deceased Erastus Kisenge Sahani.
 - ii. Whether the 1st Respondent/Plaintiff had sufficiently discharged his case
 - iii. Whether the Appellant/1st Defendant holds a genuine title to the suit parcel of land.
62. The Registration of Titles to a piece of land emphasizes on the accuracy of the Land Register so as to mirror all registerable interests that affect a particular parcel of land. The Government, as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration only the person affected is guaranteed of government compensation.
63. An allotment letter as has been held by the courts time and again, do not confer ownership to land, but is just a letter of offer. Indeed, a person holding an allotment letter has to proof that they have met the conditions stipulated therein to wit, paying the stand premium, rent, conveyancing fees, registration fees, stamp duty, survey fees, approval and planning fees as stated in the letter. There was no evidence tendered in the lower court by either parties to show that the deceased Erastus Kisenge Sahani upon being allocated the land, had met all the conditions stipulated in the said letter of allotment dated the 16th August, 2010, therefore it cannot be said that the deceased had proprietary interest to the plot of land merely because he had in his possession a letter of allotment.
64. In the case of *Philma Farm Produce & Supplies & 4 others vs. The Attorney General & 6 others* (2012) eKLR, the court held as follows:
- “The Petitioners’ claim is grounded on two letters of allocation of the suit properties. These letters do not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. It is in this respect that the Petitioner claim must fail...”



65. Further in *Marcus Mutua Muluvi & Another vs. Philip Tonui & Another* [2012] eKLR the court had also held as follows:

“The applicants have no title to the suit premises. That being the case, I do not see the proprietary interest of their suit premises that have been infringed by the Respondent, their claim to the suit premises being anchored on letters of allotment.”

66. Lastly, in *Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others* [2021] eKLR the court had held that:

“Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline. It would also help a litigant’s case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate.”

67. In the instance case, apart from the deceased Erastus Kisenge Sahani being in possession of the letter of allotment, the 1st Respondent/Plaintiff had not provided any evidence that there had been compliance with the conditions set therein and therefore upon lapse of the offer contained in the allotment letter, the land was free to be allotted to someone else.

68. The 1st Respondent/Plaintiff’s case was hinged on a sale agreement dated the 13th March, 2012 between him and the deceased Erastus Kisenge Sahani for the purchase of two acres of land within plot No. 1464 Ol Jorai Phase II Settlement Scheme wherein he had paid Kshs. 90,000/=. It is in evidence that at the time of the agreement, Erastus Kisenge Sahani only had a letter of offer and there had been no evidence adduced to the effect that the said Erastus Kisenge Sahani had obtained a title deed to the said parcel of land. In effect therefore, it goes without saying that Erastus Kisenge Sahani had no good title to pass to the 1st Respondent/Plaintiff herein in line with the above cited authorities.

69. Having found that the deceased had no good title to pass as he only had an allotment letter which has been held not to pass any proprietary interest in land, how then did the Appellant/1st Defendant process the title deed which he claims to have been issued as the first-born son of the deceased, there being no paper trail in support of the title?

70. In *Joseph Arap Ng’ok –vs- Justice Moiyo Ole Keiwua* NAI Civil Application No. 60 of 1997 the Court of Appeal observed as follows:

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

71. Section 26 (1) of the *Land Registration Act* provides:-

1. The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject



to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme

72. It was held in the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR, that statutorily, the sanctity of title to land is assured and protected under Section 24, 25 and 26 of the *Land Registration Act*. The court is also aware of the attribute of Section 26(1) (a) and (b) of the *Land Registration Act* which provides that a Title to land shall not be absolute and indefeasible because it can be impeached where it is shown to have been obtained through fraud, misrepresentation, illegally, un-procedurally or through a corrupt scheme.
73. In this case, the 1st Respondent/Plaintiff challenged Appellant/ 1st Defendant's title to the effect that it had been obtained un-procedurally there having been no Succession Proceedings held in relation to his father's estate, and secondly because despite him (Plaintiff) having bought 2 acres of the portion of the land, the whole land had been registered to the Appellant/1st Defendant, he therefore sought that the title held by the Appellant/1st Defendant be cancelled alongside any sub-divisions resulting therefrom.
74. The Appellant/1st Defendant's defence was that he had been registered as the proprietor of the suit parcel of land as the Deceased's first-born son. Now since the Appellant/1st Defendant's Title had been challenged, according to the provisions of Section 26 of the *Land Registration Act*, evidence had to be led to prove that the said title was acquired legally. In the instant case however, apart from there having been no title deed exhibited in evidence, as prima facie evidence that the person named therein, the Appellant/1st Defendant in this case was the absolute and indefeasible owner, there was also no evidence led of how the said title, if it existed, was acquired.
75. Since an allotment letter does not confer any proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein, the deceased Kisenge Sahani had no good title to pass to the 1st Respondent/Plaintiff. It is also trite that evidence, in the form of a copy of the document of title must be exhibited wherein failure to do so, has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court, and having found that no such title was exhibited by the Appellant, it cannot therefore be said that he was the proprietor of the suit parcel of land. Accordingly, upon careful consideration of the record, the documents, the submissions and the authorities cited, and pursuant to the provisions of Section 26 (1) (b) of the *Land Registration Act*, I find that the trial Court misdirected itself and wrongly concluded that the 1st Respondent/Plaintiff had proved his case on a balance of probabilities as required.
76. I thus find it necessary to interfere with that decision. I shall allow this appeal and set aside the judgment and decree of 21st June, 2024, by Hon. Mr. Y. M Barasa (PM) in Naivasha CMELC No. 104 of 2019. I hereby substitute in its place, an order of the dismissal of the 1st Respondent/Plaintiff's suit.

The Appellant shall have costs of the Appeal.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 27TH DAY OF FEBRUARY 2025.

M.C. OUNDO



ENVIRONMENT & LAND – JUDGE

