



**Free Pentecostal Fellowship in Kenya Registered Trustees v Macedonia Resort Club Limited & 2 others (Environment & Land Case 15 of 2013) [2024] KEELC 1110 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1110 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 15 OF 2013  
SO OKONG'O, J  
FEBRUARY 29, 2024**

**BETWEEN**

**FREE PENTECOSTAL FELLOWSHIP IN KENYA REGISTERED TRUSTEES ..... PLAINTIFF**

**AND**

**MACEDONIA RESORT CLUB LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**HON KENNEDY ODHIAMBO NYAGUDI ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**The Pleadings**

1. The Plaintiff brought this suit on 25<sup>th</sup> February 2013 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff amended the plaint on 27<sup>th</sup> September 2021 to add the 3<sup>rd</sup> Defendant to the suit. In its amended plaint, the Plaintiff averred that at all material times, it held all movable and immovable properties belonging to Free Pentecostal Fellowship in Kenya (hereinafter referred to only as “the Church”) in trust. The Plaintiff averred that the Church was registered under the *Societies Act*, Chapter 108 Laws of Kenya. The Plaintiff averred that the Church was the registered owner of all that property known as Unsurveyed Plot No. “A”-Kisumu Municipality measuring approximately 1.2 hectares (hereinafter referred to only as “the suit property”). The Plaintiff averred that the Church had occupied and used the suit property since 1997. The Plaintiff averred that the Church had put up a church building on the suit property.
2. The Plaintiff averred that it came to establish that through a letter dated 30<sup>th</sup> September 2011 to the Registrar of Lands, the 2<sup>nd</sup> Defendant alleged that the Church had sold the suit property to an entity known as Lion Heart Help Group of which the 2<sup>nd</sup> Defendant was the patron. The Plaintiff averred



that the allegation was false and that based on the same, the Defendants illegally and fraudulently registered the suit property in the name of the 1<sup>st</sup> Defendant. The Plaintiff averred that the Church did not sell the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or anyone else. The Plaintiff averred that the allotment and registration of the suit property in the name of the 1<sup>st</sup> Defendant was fraudulent and illegal hence null and void. The Plaintiff pleaded several particulars of fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

3. The Plaintiff averred that in January 2013, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' servants and/or agents wrongfully entered the suit property and claimed to be the owners thereof which entry amounted to trespass on the property. The Plaintiff averred that on 5<sup>th</sup> April 2013 while this suit was pending, the 2<sup>nd</sup> Defendant working in cahoots with the Registrar of Titles and the 3<sup>rd</sup> Defendant contemptuously, illegally and fraudulently registered the suit property in the name of the 1<sup>st</sup> Defendant as L.R No. 29685 and L.R No. 29686. The Plaintiff averred that it lodged a complaint against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with the 3<sup>rd</sup> Defendant and called upon the 3<sup>rd</sup> Defendant to determine the legality of the 1<sup>st</sup> Defendant's title. The Plaintiff averred that although the complaint was heard on 9<sup>th</sup> and 10<sup>th</sup> November 2016, the 3<sup>rd</sup> Defendant did not determine the complaint. The Plaintiff averred that the Church had been deprived of the use and enjoyment of the suit property and as such had suffered loss and damage. The Plaintiff sought the following reliefs against the Defendants;
  1. An order for the Chief Land Registrar to cancel the letter of allotment dated 10<sup>th</sup> March 1999 in respect of the property known as Unsurveyed Plot No. "A"-Kisumu Municipality in the name of the 1<sup>st</sup> Defendant.
  2. An order directing the Chief Land Registrar to cancel the titles for L.R No. 29685 and L.R No. 29686 in the name of the 1<sup>st</sup> Defendant.
  3. An order for the Chief Land Registrar to issue a fresh letter of allotment in the name of the Plaintiff and register the Plaintiff as the owner of the property.
  4. An order of inhibition inhibiting the registration of any dealing with the property known as Unsurveyed Plot No. "A"-Kisumu Municipality.
  5. A permanent injunction restraining the Defendants by themselves, their servants and/or agents from entering or disposing of the property known as Unsurveyed Plot No. "A"-Kisumu Municipality or any part or parts thereof and from interfering with the Plaintiff's use, occupation or enjoyment of the property.
  6. Costs of the suit plus interest.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed separate statements of amended defence on 15<sup>th</sup> February 2022. In its amended statement of defence dated 14<sup>th</sup> February 2022, the 1<sup>st</sup> Defendant denied that the Plaintiff was the registered owner of the suit property. The 1<sup>st</sup> Defendant denied further that the Plaintiff had been in possession of the suit property and had put up a church building thereon. The 1<sup>st</sup> Defendant averred that it was a stranger to the letter dated 30<sup>th</sup> September 2011 allegedly written to the Registrar of Lands by the 2<sup>nd</sup> Defendant informing him of the alleged sale by the Plaintiff of the suit property to Lion's Heart Help Group. The 1<sup>st</sup> Defendant averred that the letter of allotment that was issued to it was lawful the same as the leasehold title issued to it in respect of the suit property. The 1<sup>st</sup> Defendant denied all the particulars of fraud pleaded against it. The 1<sup>st</sup> Defendant averred that the Plaintiff had never owned the suit property which was at all material times public land. The 1<sup>st</sup> Defendant admitted that the 3<sup>rd</sup> Defendant heard the Plaintiff's complaint against the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant contended however that once it produced its title before the 3<sup>rd</sup> Defendant, there was no further inquiry



that the 3<sup>rd</sup> Defendant was required to undertake. The 1<sup>st</sup> Defendant averred that the Plaintiff was not entitled to the reliefs sought.

5. The 2<sup>nd</sup> Defendant also filed a statement of defence dated 14<sup>th</sup> February 2022. The 2<sup>nd</sup> Defendant averred that he was a stranger to the Plaintiff's claim. The 2<sup>nd</sup> Defendant denied all the allegations of fraud pleaded against him. The 2<sup>nd</sup> Defendant averred that the amended plaint disclosed no cause of action against him. The 2<sup>nd</sup> Defendant urged the court to strike out and dismiss the suit against him with costs.

### **The evidence tendered by the parties**

6. The Plaintiff and, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants called one witness each. The 3<sup>rd</sup> Defendant entered an appearance but never filed a defence nor did it participate in the hearing of the suit. The Plaintiff's witness, Bishop Walter Ogone Angienda(PW1) adopted his witness statements dated 22<sup>nd</sup> February 2013 and 27<sup>th</sup> September 2021 as part of his evidence in chief. He produced the Plaintiff's bundle of documents filed on 25<sup>th</sup> February 2013 as the Plaintiff's exhibits 1 to 12. PW1 stated that the suit property was allocated to the Plaintiff by the District Development Committee. He stated that the 1<sup>st</sup> Defendant was incorporated on 21<sup>st</sup> January 2011 and was purportedly allocated the suit property on 10<sup>th</sup> March 1999. On cross-examination by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' advocate, PW1 stated among others that the Plaintiff's claim was for Unsurveyed Plot No. "A"-Kisumu Municipality. He stated that the Plaintiff had no claim over Unsurveyed Plot No. "B"-Kisumu Municipality.
7. The 2<sup>nd</sup> Defendant who testified on his own behalf and on behalf of the 1<sup>st</sup> Defendant adopted his witness statement dated 26<sup>th</sup> October 2015 as his evidence in chief and produced as a bundle the documents attached to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' list of documents filed on 1<sup>st</sup> December 2015 as Defence exhibit 1. The 2<sup>nd</sup> Defendant stated that while the 1<sup>st</sup> Defendant had a title to the suit property, the Plaintiff had none. On cross-examination by the Plaintiff's advocate, the 2<sup>nd</sup> Defendant stated that the 1<sup>st</sup> Defendant was registered on 21<sup>st</sup> February 2011. He stated that when the 1<sup>st</sup> Defendant applied to be allocated the suit property, it was a business name awaiting incorporation as a company. He denied that he had written a letter in the letterhead of Lion's Heart Help GROUP claiming that the group had purchased the suit property from the Plaintiff. He stated that the suit property was not occupied by the 1<sup>st</sup> Defendant. He stated that the property was occupied by squatters and he did not know if the Plaintiff was among the squatters.

### **The submissions**

8. The Plaintiff filed its submissions on 21<sup>st</sup> September 2023 while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their submissions on 13<sup>th</sup> October 2023. In its submissions, the Plaintiff framed four issues for determination by the court namely; whether the suit property was allocated to the Plaintiff, whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants obtained title to the suit property fraudulently, whether the Plaintiff was entitled to the reliefs sought in the plaint, and who should bear the costs of the suit?
9. On the first issue, the Plaintiff submitted that it placed evidence before the court showing that the suit property was allocated to it and that what it was waiting for was a formal letter of allotment. The Plaintiff submitted that it applied to be allocated the suit property and the application was approved by the District Development Committee and the District Land Officer. The Plaintiff submitted that it followed due process in its application for the suit property and that the property was reserved for it awaiting issuance of a letter of allotment. The Plaintiff cited *James Maina & 3 others v. Attorney General & 4 Others* [2022] eKLR in support of this submission.



10. On whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired the suit property fraudulently, the Plaintiff submitted that at the time the 1<sup>st</sup> Defendant purported to acquire the suit property, the same had already been allocated to the Plaintiff and what the Plaintiff was waiting for was a letter of allotment. The Plaintiff submitted that the suit property was not available for allocation to the 1<sup>st</sup> Defendant. The Plaintiff submitted that the fact that the suit property was purportedly allocated to the 1<sup>st</sup> Defendant on 10<sup>th</sup> March 1999 while the 1<sup>st</sup> Defendant was incorporated on 21<sup>st</sup> January 2011 was evidence of fraud. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' acts of fraud were also apparent in the letter dated 30<sup>th</sup> September 2011 (Plaintiff's exhibit 6) by the 2<sup>nd</sup> Defendant to the Registrar of Lands, Nairobi in which the 2<sup>nd</sup> Defendant claimed that the Plaintiff sold the suit property. The Plaintiff submitted that the 2<sup>nd</sup> Defendant did not adduce any evidence of how the suit property was allocated to the 1<sup>st</sup> Defendant. The Plaintiff submitted that the title to the suit property was also issued to the 1<sup>st</sup> Defendant while this suit was pending hearing. The Plaintiff submitted that a title obtained fraudulently was impeachable under Section 26(1)(a) of the [Land Registration Act](#) 2012. The Plaintiff cited two decisions in support of this submission. The Plaintiff submitted that it had proved its case against the Defendants on a balance of probabilities and as such, it was entitled to the reliefs sought in its amended plaint. Regarding costs, the Plaintiff submitted that the same is at the discretion of the court and that as a general rule, the same follows the event.
11. In their submissions, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants framed four issues for determination by the court namely; whether the Plaintiff had proved its case against the Defendants to warrant the grant of the orders sought in the plaint, whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired Usurveyed Plot No. "A"-Kisumu Municipality fraudulently, whether the Plaintiff was entitled to the reliefs sought in the plaint, and who should bear the costs of the suit? On the first issue, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants explained the process of acquiring public land as set out in *Lagat v. Kebut*[2023]eKLR. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the Commissioner of Lands was the final authority on the alienation of public land and that the allocations made by local authorities were not binding on the Commissioner of Lands as they were merely advisory. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that a letter of allotment did not confer any interest in land and that it was a mere offer awaiting acceptance and fulfilment of the conditions set out therein by the offeree. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that it was a lease and a certificate of lease that came at the end of the allocation process that conferred title to land.
12. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that the Plaintiffs did not have an allotment letter issued to them in respect of the suit property that would have initiated the process of creating an interest in the property in their favour. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that it was only the Commissioner of Lands who had the power to allocate public land. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that in the absence of a letter of allotment of the suit property in favour of the Plaintiff and evidence of the fulfilment of the terms thereof, no interest accrued to the Plaintiff in respect of the suit property.
13. On the issue of fraud alleged against the Defendants, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants cited Section 107 of the [Evidence Act](#), Chapter 80 Laws of Kenya and submitted that the burden was on the Plaintiff to plead, particularise and prove the alleged acts of fraud. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants cited several authorities in support of this submission. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that they had no power to cause the suit property to be registered in the name of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that they placed before the court communication from the Commissioner of Lands confirming that the suit property was allocated to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the said communication confirmed the genuineness of the process through which the 1<sup>st</sup> Defendant acquired the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted further that the certificate of title that was issued to the 1<sup>st</sup> Defendant was prima facie evidence that the 1<sup>st</sup> Defendant was the absolute and



indefeasible owner of the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the Plaintiff did not prove the alleged fraud in the acquisition of the suit property by the 1<sup>st</sup> Defendant.

14. On whether the Plaintiff was entitled to the reliefs sought in the plaint, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the Plaintiff did not establish a valid legal claim on the basis of which a relief could be granted. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the Plaintiff did not establish any proprietary interest in the suit property capable of being protected by the law. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the minutes of the Sub-District Development Committee Meeting held on 6<sup>th</sup> February 1998 at which the Plaintiff's application for allocation of a plot at Kibos Market was considered and approved could not confer any interest in the suit property upon the Plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the Plaintiff did not establish that it owned the suit property or any other property within Kisumu Municipality. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also wondered how the Plaintiff's land that measured 4.047 hectares came to measure 1.2 hectares which was the size of the land registered in the name of the 1<sup>st</sup> Defendant.
15. On the issue of costs, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that costs follow the event and that the same is at the discretion of the court. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants urged the court to dismiss the Plaintiff's suit with costs to the Defendants.

### **Analysis and determination of the issues arising**

16. I have considered the pleadings, the evidence tendered by the parties in proof of their respective cases and the submissions by the advocates for the parties. From the pleadings, the following in my view are the issues arising for determination in this suit;
  1. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired title to Grant No. I.R. 151216, L.R No. 29685 (hereinafter referred to only as "Plot No. 29685") formerly known as Unsurveyed Plot No. "A"-Kisumu Municipality fraudulently.
  2. Whether the Plaintiff had a valid interest or claim in the parcel of land known as Unsurveyed Plot No. "A"-Kisumu Municipality (the suit property).
  3. Whether the Plaintiff is entitled to the reliefs sought in its amended plaint.
  4. Who is liable for the costs of the suit?

### **Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired title to Grant No. I.R. 151216, L.R No. 29685 (hereinafter referred to only as "Plot No. 29685") formerly known as Unsurveyed Plot No. "A"-Kisumu Municipality fraudulently.**

17. It is common ground that the Unsurveyed Plot No. "A"-Kisumu Municipality (suit property) was government land. To determine whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired the suit property which was subsequently registered as Plot No. 29685 lawfully, it is necessary to consider the procedure of and the law on allocation of government land.

Section 3(a) of the Government Lands Act, Chapter 280 Laws of Kenya (now repealed) provides that;

“The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—



- (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;”

“Unalienated Government land” is defined in Section 2 of the Government Lands Act as:

“Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment”.

Section 7 of the Government Lands Act provides that:

“The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act:

Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3, 12, 20 and 128.”

18. Before the promulgation of *the Constitution* of Kenya 2010 that created the National Land Commission, the 3<sup>rd</sup> Defendant herein, allocation of government land would commence with an application to the Commissioner of Lands for allotment of land identified by a prospective allottee. The Commissioner of Lands on receipt of the application would make inquiries internally and from other government departments whether the parcel of land concerned was available for allocation. If it was confirmed that the land was available for allocation, the Commissioner of Lands would then request the Director of Physical Planning to prepare a Part Development Plan (PDP) for the parcel of land. After the PDP was prepared, approved and registered, the Commissioner of Lands would issue a letter of allotment of the land in question to the applicant. The letter of allotment would contain the terms on which the land was being allotted to the applicant. The letter of allotment would call upon the applicant to accept the allotment and pay the charges set out in the letter within a prescribed time. It was upon the applicant accepting the allotment and meeting the conditions in the letter of allotment that the Commissioner of Lands would authorise the Director of Surveys to survey the land. After the survey, a Grant or a lease would be issued by the Commissioner of Lands to the applicant. The Grant or the lease would incorporate the terms in the letter of allotment.
19. The 1<sup>st</sup> Defendant has claimed that Plot No. 29685 was allocated to it as Unsurveyed Plot No. “A”-Kisumu Municipality (the suit property) through a letter of allotment dated 10<sup>th</sup> March 1999. The said letter of allotment was produced in evidence as an exhibit. The particulars of directors and shareholders of the 1<sup>st</sup> Defendant (Form CR 12) that was produced in evidence by the Plaintiff showed that the



- 1<sup>st</sup> Defendant was incorporated on 21<sup>st</sup> January 2011. This means that the 1<sup>st</sup> Defendant was not in existence on 10<sup>th</sup> March 1999 when it was purportedly allocated the suit property. Although the 1<sup>st</sup> Defendant claimed that it was in existence on 10<sup>th</sup> March 1999 as a business name, no evidence was placed before the court in proof of the allegation. In any event, the parcel of land was not allocated to Macedonia Resort Club but to Macedonia Resort Club Limited. It is therefore my finding that the suit property could not have been allocated to the 1<sup>st</sup> Defendant on 10<sup>th</sup> March 1999 when it was non-existent. The purported allocation was therefore fraudulent, unlawful and a nullity.
20. The 1<sup>st</sup> Defendant was supposed to accept the allotment and pay the charges that were set out in the letter of allotment within 30 days from the date of the allotment. There was no evidence that the 1<sup>st</sup> Defendant accepted the allotment. This is not surprising. Since the 1<sup>st</sup> Defendant was not in existence; it could not have accepted the purported allotment. There was also no evidence placed before the court showing that the 1<sup>st</sup> Defendant paid the charges that were set out in the said letter of allotment. According to the letter of allotment, the stand premium for the property was Kshs. 259,000/- while the annual rent was Kshs. 51,800/-. Together with other charges, the 1<sup>st</sup> Defendant was supposed to pay to the Government a total sum of Kshs. 319,540/- for the allotment. I have noted on Grant No. 151216 for L.R No. 29685(Plot No. 29685) that the 1<sup>st</sup> Defendant paid a sum of Kshs. 50,000/- only instead of Kshs. 259,000/- as stand premium. The annual rent is also indicated in the said Grant as Kshs. 10,000/- instead of Kshs, 51,800/-. The court has noted that the unsurveyed land that was allocated to the 1<sup>st</sup> Defendant measured 1.200 hectares and upon survey, the land retained the said measurement. There would have been no justification therefore for the reduction in the stand premium from Kshs. 259,000/- to Kshs. 50,000/-. The 1<sup>st</sup> Defendant did not place any evidence before the court showing that the charges that were set out in the letter of allotment were varied or amended by the Commissioner of Lands. It is my finding therefore that the 1<sup>st</sup> Defendant did not comply with the terms of the letter of allotment dated 10<sup>th</sup> March 1999 even if it were to be assumed that it was in existence. The unexplained variation of the terms of allotment reinforces the Plaintiff's contention that the purported allocation of the suit property to the 1<sup>st</sup> Defendant was fraudulent.
21. The Plaintiff also placed in evidence a letter dated 30<sup>th</sup> September 2011 said to have been written by the 2<sup>nd</sup> Defendant, a director of the 1<sup>st</sup> Defendant to the Registrar of Lands in the letterhead of "The Lion Heart Help Group" claiming that the parcels of land that had been allocated to the Plaintiff and another entity known as Peace Ministries had been sold by the two entities to the said "The Lion Heart Help Group" and that the group of which the 2<sup>nd</sup> Defendant was the patron had chosen to register the said parcels of land in the name of Macedonia Resort CLUB. Although the 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied the said letter in their defences, I am persuaded that it was pursuant to that letter that the 1<sup>st</sup> Defendant became registered as the proprietor of the suit property. The 2<sup>nd</sup> Defendant admitted at the trial that "The Lion Heart Help Group" was known to him. The signature said to be that of the 2<sup>nd</sup> Defendant in the said letter resembled the signatures of the 2<sup>nd</sup> Defendant in the other letters that he produced in evidence and his signature in the witness statement. The 2<sup>nd</sup> Defendant had the opportunity but did not adduce credible evidence showing that the said letter was not written by him. I have concluded that it was on the strength of this letter that the 1<sup>st</sup> Defendant acquired the suit property because the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not place before the court any correspondence or document concerning the suit property issued to the 1<sup>st</sup> Defendant before 30<sup>th</sup> September 2011 when this letter was written. The letter of allotment purportedly issued to the 1<sup>st</sup> Defendant on 10<sup>th</sup> March 1999 appears to me to have been issued after 30<sup>th</sup> September 2011 but was backdated to 10<sup>th</sup> March 1999. I am of the view that the 2<sup>nd</sup> Defendant hijacked the application that the Plaintiff had made to the Commissioner of Lands to be allocated the suit property and had the purported letter of allotment issued to the 1<sup>st</sup> Defendant instead of the Plaintiff who had been pursuing it since 1998.



Since the Plaintiff never sold the suit property to the 2<sup>nd</sup> Defendant's organization, "The Lion Heart Help Group" the Commissioner of Lands was misled by the 2<sup>nd</sup> Defendant to process a title in favour of the 1<sup>st</sup> Defendant in respect of the suit property.

22. In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another, the court stated as follows:

"We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest".

23. In Hubert L. Martin & 2 Others v. Margaret J. Kamar & 5 Others[2016] eKLR, the court stated as follows:

"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... 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."

24. In Adan Abdirahani Hassan & 2 others v Registrar of Tiles & 2 others [2013] eKLR, the court stated as follows:

"20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that *the Constitution* protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by *the Constitution*, he must show that he has followed the due process in acquiring that which he wants to be protected."

25. In Munyu Maina v. Hiram Gathiha Maina, Civil Appeal No.239 of 2009, [2013]eKLR, the Court of Appeal stated as follows:

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



26. Due to the foregoing, it is the finding of this court that the 1<sup>st</sup> Defendant acquired L.R No. 29685, Grant No. 151216 (formerly known as Unsurveyed Plot No. “A”-Kisumu Municipality) fraudulently and illegally.

**Whether the Plaintiff had a valid interest or claim in the parcel of land known as Unsurveyed Plot No. “A”-Kisumu Municipality (the suit property).**

27. In the 1980s and 1990s, some applications for allocation of government land would start at the Sub-District Development Committee of the sub-district where the land was situated. If approved at that level, the application would be referred to the District Development Committee for further approval. It was upon the approval of the application by the District Development Committee that the applicant would make the application for allotment of the government land to the Commissioner of Lands. From the evidence before the court, the Plaintiff commenced the allotment application process at the Sub-District Development Committee level where the application was approved on 6<sup>th</sup> February 1998. The application was also approved by the District Development Committee sometime in 1999 (See Plaintiff’s Exhibit 2). The Plaintiff thereafter made an application to the Commissioner of Lands to be allocated land which was described as “A plot at Kibos”. The land that the Plaintiff applied for initially measured 4.047 hectares. According to the evidence adduced by the Plaintiff, the Plaintiff was advised that the land it had applied for was too big and the same was reduced to about 2.00ha. The Plaintiff’s application from the evidence on record was approved by the District Land Officer with whom the Plaintiff’s representatives visited the land and prepared a sketch drawing of the location. The Plaintiff which had taken possession of the land thereafter kept following up on the letter of allotment that was never issued by the Commissioner of Lands. It was not until 2013 that the Plaintiff learnt that the 2<sup>nd</sup> Defendant had written to the Registrar of Lands claiming falsely that the Plaintiff had sold the suit property to “The Lion Heart Help Group” and that the group had decided that a title for the property be issued in the name of the 1<sup>st</sup> Defendant. It was at that stage that the Plaintiff came to court.
28. When the Plaintiff came to court, the 1<sup>st</sup> Defendant had not been issued with a title for the suit property. The title was issued to the 1<sup>st</sup> Defendant while this suit was pending. While I agree with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that the Plaintiff had not been issued with a letter of allotment and as such had not acquired lawful proprietary interest in the suit property, the Plaintiff had made an application to be allocated the land in question and was in possession of the land. In my view, the Plaintiff had a legitimate expectation that the Commissioner of Lands would respond to or determine its application before the suit property could be allocated to any other person. As mentioned in the decision I have cited earlier, *the Constitution* of Kenya 2010 protects not only legal rights but other values such as human rights, equity, integrity, good governance, transparency, accountability, social justice and the rule of law. I am of the view that the Plaintiff’s legitimate expectation that it would receive a response from the Commissioner of Lands on its application for allocation of the suit property although created no proprietary interest in the suit property in favour of the Plaintiff was protectable by the law. It is therefore my finding that although the Plaintiff was not registered as the owner of the suit property and had not been issued with a letter of allotment, the Plaintiff had sufficient interest in the suit property that deserved protection by the law, particularly against those seeking to dispossess it of the property through fraudulent means.
29. In Republic v. District Commissioner, Langata District & another ex parte Kibera Community Self Help Programme, Kenya [2014] eKLR, the court stated as follows:
- “5. There must be certainty and predictability in executive actions. In all fairness and justice, this court would not allow the applicant’s reasonable expectation over title to property and which has already accrued to be whimsically taken



away without due process. In *Keroche Industries Ltd v Kenya Revenue Authority and others* HC Misc. Civil Application No. 1214 of 2004 (Unreported) the Court observed that, "...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all...which is, the value of the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation...legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way...public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

**Whether the Plaintiff is entitled to the reliefs sought in its amended plaint.**

30. I have set out earlier in the judgment the reliefs sought by the Plaintiff. The first relief sought by the Plaintiff is the cancellation of the letter of allotment dated 10<sup>th</sup> March 1999 purportedly issued to the 1<sup>st</sup> Defendant in respect of the suit property. I have made a finding that the said letter of allotment was fraudulently issued and as such it was illegal, null and void. It is not necessary to cancel such a letter. A declaration that the letter is a nullity would be sufficient in my view.
31. The second relief was for the cancellation of Grant No. I.R 151216 for L.R No. 29685. The suit property was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). Section 23 of the Registration of Titles Act provides as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.
32. The term fraud is defined in Black’s Law Dictionary 9<sup>th</sup> Edition as follows:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.
33. I have made a finding that Grant No. I.R 151216 for L.R No. 29685 was issued unprocedurally and fraudulently. A case has therefore been made for the cancellation thereof.



34. The Plaintiff has also sought an order that the Chief Land Registrar be ordered to issue the Plaintiff with a letter of allotment and to register the Plaintiff as the owner of the suit property. I am of the view that the court has no power to allocate government land or any other land. That power is now held by the 3<sup>rd</sup> Defendant. The much the court can do is to direct the 3<sup>rd</sup> Defendant to consider the Plaintiff's application and communicate its decision on the same without further delay. The Plaintiff has also sought an order of inhibition inhibiting the registration of any other dealing with Unsurveyed Plot No. "A"-Kisumu Municipality (the suit property). The inhibition could only be registered against Grant No. I.R 151216 for L.R No. 29685. Since the same has been found to be void and is for cancellation, the inhibition sought would serve no purpose. I also find no justification for issuing a permanent injunction to restrain the Defendants from interfering with the Plaintiff's occupation of the suit property. After the 1<sup>st</sup> Defendant's title is cancelled, there would be no basis for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' interference with the Plaintiff's occupation of the suit property as it pursues its application for allocation of the land. I am of the view that the injunction sought is not necessary.
35. Regarding costs, section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya provides that costs of and incidental to a suit are at the discretion of the court. As a general rule, costs follow the event. In this case, the Plaintiff has partly succeeded in its claim. I will award the Plaintiff half the costs of the suit.

### **Conclusion**

36. In conclusion, I hereby make the following final orders in the matter;
1. I declare that the purported letter of allotment dated 10<sup>th</sup> March 1999 issued to the 1<sup>st</sup> Defendant in respect of Unsurveyed Plot No. "A"-Kisumu Municipality was fraudulently issued and as such the same is null and void.
  2. Grant No. I.R 151216 for L.R No. 29685 issued to the 1<sup>st</sup> Defendant pursuant to the said letter of allotment is cancelled.
  3. The 3<sup>rd</sup> Defendant shall consider the Plaintiff's pending application for allotment of the parcel of land situated at Kibos-Kisumu Municipality occupied by the Plaintiff and shall make a decision on the application within 90 days from the date of service upon it of this judgment and a decree extracted therefrom.
  4. The Plaintiff shall have half the costs of the suit to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**DATED AND DELIVERED AT KISUMU ON THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Chacha h/b for Ms. Kafafa for the Plaintiff

Ms. Okaka h/b for Mr. Yogo for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

N/A for 3<sup>rd</sup> Defendant

Ms. J. Omondi-Court Assistant

