



REPUBLIC OF KENYA



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**Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023)  
[2025] KECA 776 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 776 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E020 OF 2023  
SG KAIRU, P NYAMWEYA & KI LAIBUTA, JJA  
MAY 9, 2025**

**BETWEEN**

**KETAN NAVINCHANDRA DOSHI ..... APPELLANT**

**AND**

**HON. JUSTICE CHARLES P. CHEMUTUT ..... 1<sup>ST</sup> RESPONDENT**

**PETER WALKER ..... 2<sup>ND</sup> RESPONDENT**

**MAUREEN JANET WALKER ..... 3<sup>RD</sup> RESPONDENT**

**JACQUELINE JOSEPHINE WANJIKU ..... 4<sup>TH</sup> RESPONDENT**

**MATABATU INVESTMENTS LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 6<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 7<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 8<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Environment and Land Court at Malindi (M.A. Odeny, J.) dated 16th February 2023 in ELC Cause No. 136 of 2018)*

**JUDGMENT**

1. In this appeal, the appellant, Ketan Navinchandra Doshi (Mr. Doshi), is challenging the judgment delivered by the Environment and Land Court at Malindi (ELC) (Odeny, J.) on 16<sup>th</sup> February 2023. In that judgment, the ELC declared that the 1<sup>st</sup> respondent, Justice Charles P. Chemutut (Justice Chemutut) is entitled to exclusive and unimpeded right of possession and occupation of the properties known as MN/III/433, MN/III/434, and MN/III/435; that any title documents held by Peter Walker, Maureen Janet Walker, Jacqueline Josephine Wanjiku, the 2<sup>nd</sup> to 4<sup>th</sup> respondents respectively, were



- obtained fraudulently, illegally and, as such, are null and void: and that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, namely Peter Walker and Maureen Janet Walker (Mr. & Mrs. Walker) are wrongfully in occupation of the properties and are accordingly trespassers thereon, and are not entitled to enter or remain thereon.
2. In the same judgment, the ELC issued a permanent injunction restraining Mr. & Mrs. Walker and Jacqueline Josephine Wanjiku (Ms. Wanjiku), the 4<sup>th</sup> respondent, from entering, remaining on or continuing in occupation of the said properties; an order to give vacant possession within 30 days failure to which eviction to issue; and an order directing the Land Registrar to cancel the titles to the properties held by Mr. & Mrs. Walker and Ms. Wanjiku or any titles that emanated from the suit parcels of land. The court also ordered Mr. Doshi to indemnify Mr. & Mrs. Walker by refunding the purchase price of Kshs. 7.5 million together with interest. Justice Chemutut was awarded costs of the suit.
  3. The procedural history will provide context to the appeal. In his Amended Plaint dated 24<sup>th</sup> September 2018 in which Mr. & Mrs. Walker were named as the defendants, Justice Chemutut pleaded that he was at all material times the duly registered owner and entitled to possession of the properties known as parcel numbers MN/III/433, MN/III/434, and MN/III/435 (the properties) measuring in total 8.1 acres. He averred that, on 3<sup>rd</sup> March 1992, alongside one G. Somba Kivalya, he applied for allocation of residential plots to the Commissioner of Lands; that his application was approved and endorsed by the former President H.E. Daniel Arap Moi whereupon the properties were allocated to him; that he paid the requisite fees of Kshs. 441,000; that he is the registered proprietor of the unexpired residue of the term of 99 years from 1<sup>st</sup> June 1992 of the properties on the basis of a letter of allotment and a decision of the National Land Commission (NLC), the 6<sup>th</sup> respondent, and that a Certificate of Title was issued to him. It was his case that he has enjoyed peaceful occupation of the properties since 1992.
  4. Justice Chemutut pleaded further that, on or about 26<sup>th</sup> April 2018, he found out that Mr. & Mrs. Walker had trespassed on the properties, subdivided and fenced off portions of the properties thereby occasioning him loss and damage; that, despite demand to cease doing so, Mr. & Mrs. Walker persisted. It was on that basis that he prayed for and was granted the reliefs to which we have already referred.
  5. In his witness statement dated 6<sup>th</sup> September 2018, Justice Chemutut stated that he was unable to develop the properties immediately due to demands of his duty as a judge; that, on 25<sup>th</sup> June 1992, he had requested the Commissioner of Lands to consent to the transfer of the properties to an entity known as Crockery & Utensils Limited, but that his request was declined.
  6. He stated further that, upon further enquiry, he learnt that on 17<sup>th</sup> May 2011 one Mr. Mwaniki, acting on behalf of the Director of Surveys, had fraudulently and unlawfully issued an authentication slip to the Commissioner of Lands in respect of Land Reference Numbers MN/III/428-435; that, consequently, on 21<sup>st</sup> June 2011, one Mr. Muthomi Ngaruthi acting on behalf of the Commissioner of Lands also fraudulently and unlawfully issued an indent to the Director of Surveys in respect of plot MN/III/433; that, on 13<sup>th</sup> March 2012, Mr. Muthomi Ngaruthi proceeded further to fraudulently and unlawfully forward a grant of one of the plots, namely MN/III/435 to the Senior Registrar of Titles, Mombasa, through the Principal Registrar of Titles Nairobi in favour of the 5<sup>th</sup> respondent, Matabatu Investment limited; that, on 16<sup>th</sup> September 2013, he lodged a complaint with the 6<sup>th</sup> respondent, the National Land Commission (NLC) regarding the fraudulent and unlawful titling and acquisition of his property by Ms. Wanjiku and Matabatu Investment limited (the 4<sup>th</sup> and 5<sup>th</sup> respondents); that NLC convened a hearing on 28<sup>th</sup> August 2014, but that Ms. Wanjiku and Matabatu Investment limited failed to appear; that, on 22<sup>nd</sup> September 2024, he carried out a search at the Land Registry Mombasa and found that Albert Tsuma Tonya, Mbaru Lewa Mbaru, Ms. Wanjiku and Matabatu Investment limited had fraudulently and unlawfully acquired title deeds for MN/III/432, 433, 434 and 435 respectively.



7. He stated further that, in a determination dated 8<sup>th</sup> October 2015 published in Kenya Gazette Notices on 22<sup>nd</sup> January 2016 and 17<sup>th</sup> July 2017, NLC decided to revoke Grant Numbers CR. 55781, 55782, 55798 and 55799; ordered a certificate of lease/title to be issued to him; and that the Registrar of Titles be served with that order for implementation; that, the Chief Land Registrar having failed to do so, he successfully moved the ELC by Judicial Review Application No. 3 of 2016 which, in a judgment delivered by Olola, J. on 19<sup>th</sup> September 2017, allowed the judicial review application and granted an order of mandamus directed to the Chief Land Registrar to revoke the said Grant Numbers 55799,55798, 55781, in 55782 for parcel numbers MN/III/432 to 435, and to expunge them from the registry of titles; that a Certificate of Lease/title be issued to him; and that the parcels of land under those Grants be vested in him.
8. In their Amended Statement of Defence dated 17<sup>th</sup> October 2018, Mr. & Mrs. Walker denied the claim by Justice Chemutut. They asserted that the properties, namely parcel numbers MN/III/433, MN/III/434, and MN/III/435 claimed by Mr. Chemutut are not the same as the parcels registered in their names, namely subdivision No.'s 9882 (original No. 4394/7) Section III,MN; 9883 (original No. 4393/1) Section III,MN; and 9884 (original No. 4393/72) Section III,MN; and that, even if the properties are the same as theirs, they (Mr. & Mrs. Walker) became registered proprietors thereof earlier in time than Justice Chemutut. It was their case that the Mr. Doshi transferred those properties to them by a Transfer dated 22<sup>nd</sup> June 2006 registered on 3<sup>rd</sup> August 2006 as Number C.R. 38031/2; CR 38037/2 and CR 38038/2.
9. Mr. & Mrs. Walker averred that they purchased the said plots from Mr. Doshi under an Agreement for Sale dated 12<sup>th</sup> May 2006 and thereafter became registered as owners. They intimated that they would apply to join Mr. Doshi in the suit as a third-party seeking indemnity for any loss or damage they may incur. Following their application in that regard, they were granted leave to issue a Third-Party Notice to Mr. Doshi by an order given on 5<sup>th</sup> October 2018 and issued on 13<sup>th</sup> December 2018.
10. In the Third Party Notice, Mr. & Mrs. Walker asserted that parcels subdivision No.'s 9882 (original No. 4394/7) Section III, MN; 9883 (original No. 4393/1) Section III, MN; and 9884 (original No. 4393/72) Section III, MN were created upon subdivision of L.R. Number MN/III/4393 and 4394, which had been granted to Mr. Doshi by the President pursuant to Grant Numbers CR 37127 and CR 37128.
11. In addition to the Agreement for Sale dated 12<sup>th</sup> May 2006 entered into with Mr. Doshi, and the Transfer of Lease in their favour with respect to Subdivision Numbers 4400, 4401 and 4402 (Orig. No. 4394/4) Section III Mainland North, South of Takaungu Trading Centre, Kilifi District, Mr. & Mrs. Walker attached Certificate of Titles: CR 70568 in respect of Subdivision Number 9882 (orig. No. 4394/7) of Section III Mainland North as delineated on Land Survey Plan No. 370414; CR 70568 in respect of Subdivision Number 9882 (orig. No.4394/7) of Section III Mainland North as delineated on Land Survey Plan No. 370414; and CR 70571 in respect of Subdivision Number 9884 (orig. No. 4393/2) of Section III Mainland North as delineated on Land Survey Plan No. 370416, all registered on 15<sup>th</sup> September 2017. Also attached was: a Certificate of Title Number CR 38038 dated and registered as CR 38038/I on 1<sup>st</sup> July 2004 in favour of Mr. Doshi in respect of Sub-division 4400; a Certificate of Title Number CR 38037 dated and registered as CR 38037/I on 1<sup>st</sup> July 2004 in favour of Mr. Doshi in respect of Sub-division 4401; and a Certificate of Title Number CR 38031 dated and registered as CR 38031/I on 1<sup>st</sup> July 2004 in favour of Mr. Doshi in respect of Sub-division 4402. Certificates of Postal Searches as on 24<sup>th</sup> August 2007 indicated that Mr. & Mrs.Walker as registered owners of those plot Numbers 4400, 4401 and 4402.



12. Also produced were Grant Numbers I.R 37127 in respect of LR No. MN/III/4393 registered on 23<sup>rd</sup> December 2003 in favour of Mr. Doshi endorsed “title closed” upon New Certificates of Titles CR 38037 to CR 38038 issued in respect of sub-divisions No. 4400 and 4401 respectively; Grant Number I.R 37128 in respect of LR No. MN/III/4394 registered on 23<sup>rd</sup> December 2003 in favour of Mr. Doshi endorsed “title closed” upon New Certificates of Titles CR 38031 to CR 38036 issued in respect of sub-divisions No. 4402 to 4405 respectively. Deeds of rectification with regard to land reference numbers were subsequently registered on 15<sup>th</sup> September 2017. Mr. & Mrs. Walker subsequently issued a notice of claim to the NLC and to the Chief Land Registrar.
13. In his statement of defence, the Attorney General, the 8<sup>th</sup> respondent, acting on behalf of the Chief Land Registrar, denied Justice Chemutut’s claim asserting that, if the properties were indeed allocated to him, he failed to meet the conditions of allocation.
14. On his part, Mr. Doshi filed his statement of defence dated 1<sup>st</sup> February 2019 in response to the Third Party Notice issued by Mr. & Mrs. Walker and denied their claims and asserted that the claim was in any event statute barred under Section 4(1) and 19 of the *Limitation of Actions Act*, and that the court had no jurisdiction to entertain the monetary claim of Kshs.7.5 million. Mr. Doshi, in turn, sought and was granted leave to issue a Third Party notice against the Attorney General and the NLC for indemnity. On 15<sup>th</sup> October 2020, the ELC ordered that NLC was deemed to have admitted liability to contribute or indemnify the appellant.
15. In a separate action by way of Petition No. 2 of 2018, Matabatu Investment limited and Ms. Wanjiku had sued Justice Chemutut and the NLC. The details of that action are scanty as the pleadings in that regard are not included in the record of appeal before us. Nevertheless, that petition and Justice Chemutut’s suit were consolidated by a consent order recorded before the ELC on 17<sup>th</sup> September 2018 when directions were given on the conduct of the consolidated actions.
16. During the trial, Justice Chemutut testified on his own behalf, adopted his witness statements and was cross examined and closed his case. Maureen Janet Walker testified on her own behalf and on behalf of her husband. She was also cross examined and thereafter the case for Mr. & Mrs. Walker was closed. Others who testified were Ms. Wanjiku; David Kahindi Samson, a retired Chief in the area where the properties are situated; Wilson Kibichi, an Assistant Director Geospatial Data Management and an employee of the Ministry of Lands and Planning in the office of Director of Surveys; Samuel Kariuki Mwangi, Land Registrar in Mombasa Land Registry; and Mr. Doshi.
17. After reviewing the evidence and considering the submissions, the judge framed the issues for resolution as follows: whether the “suit parcels were available for allocation” to Justice Chemutut; “whether upon allocation of the suit parcels of land to” Justice Chemutut, “the same were available for reallocation to” Ms. Wanjiku and Matabatu Investments Limited; whether Mr. Doshi “had a good title to pass to” Mr. and Mrs. Walker; whether Mr. and Mrs. Walker “are innocent purchasers for value”; whether the NLC had jurisdiction to hear and determine Justice Chemutut’s complaint; whether the issues raised by Ms. Wanjiku and Matabatu Investments Limited in their amended counterclaim and in the petition are merited; and “who is the rightful owner of the suit property”.
18. In her judgment, the Judge found that, the properties having been allocated to Justice Chemutut, the same were not available for reallocation to either Mr. Doshi or to Ms. Wanjiku and Matabatu Investments Limited; that Mr. Doshi did not prove that he had acquired a good title to pass to Mr.& Mrs. Walker as he was not able to ascertain the root of title through application and allocation of the properties, and that it follows that Mr. Doshi’s “title was unprocedurally obtained as there was already an allocation” to Justice Chemutut “which was valid and has been confirmed by the court in the JR



- application”; and that the issuance of a grant to Mr. Doshi “was therefore null and void ab initio and ineffectual to confer any right, interest or title upon” Mr. Doshi.
19. The Judge further found that “the only remedy is to indemnify” Mr. & Mrs. Walker “with a refund of the purchase price and interest at court rates.” The plea of limitation by Mr. Doshi in defence of the claim by Mr. & Mrs. Walker was rejected on the basis that they could only have discovered the mistake or anomaly when the suit was filed in 2018. The court also found that NLC had jurisdiction to entertain Justice Chemutut’s complaint. As regards the issues raised by Ms. Wanjiku and Matabatu Investments Limited in their amended counterclaim and in the petition, the Judge found that the same had been determined in the JR application.
  20. In the end, the Judge found that Justice Chemutut had proved his case on a balance of probabilities and proceeded to grant the reliefs to which we have referred. Hence the present appeal.
  21. The appellant complains that the ELC erred: by failing to find that a letter of allotment is not a title to property; by finding that Justice Chemutut had met the conditions in the letter of allotment; failing to find that the letter of allotment had lapsed and that the property was available for alienation and reallocation to Mr. Doshi; failing to find that Justice Chemutut did not discharge his burden of proof; failing to appreciate that Mr. Doshi was not privy to, and his rights were infringed by the decision of NLC or the decision in Judicial Review No. 3 of 2016; in wrongly applying Section 26 of the *Limitation of Actions Act* in relation to the claim by way of Third Party Notice by Mr. & Mrs. Walker; in failing to determine the appellant’s claim against the Attorney General, the 8<sup>th</sup> respondent, in terms of his Third party Notice; and in failing to determine all material issues before the court and arriving at a manifestly erroneous decision resulting in a miscarriage of justice.
  22. We heard the appeal on 3<sup>rd</sup> October 2024. Mr. Mohamed Karega, learned counsel, appeared for Mr. Doshi. Ms. Metto, learned counsel, appeared for Justice Chemutut. Miss. Barasa learned counsel appeared for Mr. & Mrs. Walker. Mr. Munga, learned counsel, appeared for the Chief Land Registrar and the Attorney General, the 7<sup>th</sup> and 8<sup>th</sup> respondents. Although the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents had been served with the hearing notice, they did not appear during the hearing of the appeal. Counsel orally highlighted their respective written submissions.
  23. Counsel for Mr. Doshi submitted that, contrary to the finding by the ELC, Justice Chemutut did not prove his case to the required standard; he did not sue Mr. Doshi and no allegation of fraud was made against Mr. Doshi; that Justice Chemutut did not discharge his burden of proof under section 107 and 108 of the *Evidence Act*; that his entire claim was based on a letter of allotment of 1992, which contained conditions that Justice Chemutut admittedly did not comply with; that the letter of allotment required Justice Chemutut to accept the offer within 30 days, but that no evidence of acceptance was tendered, and that the payment required under the letter of allotment was not made until 5 years later in 1997.
  24. It was submitted that, by the time Deed Plans in favour of Justice Chemutut were processed in 2012, there were already other Deed Plans in existence; that in 1998, upon re-survey, the title numbers on the basis of which Justice Chemutut’s claim was based ceased to exist, and that it is questionable how he got Deed Plans for titles that do not exist. It was submitted that Justice Chemutut got title issued in 2017 and the root of that title was not established.
  25. Counsel submitted that the trial judge made a fundamental error by shifting the burden of proof to Mr. Doshi when the burden lay with Justice Chemutut being the party attacking Mr. Doshi’s title. Counsel referred to the Supreme Court decision in *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79(KLR); and the decision of this Court in *Dr. Joseph NK Arap Ng’ok v Justice Moijo ole Keiwua & 4 Others NAI*, Civil Application No. 60 of 1997 in support



of the argument that a letter of allotment confers no transferable interest in land, unless and until it is perfected and a title issued.

26. Counsel also faulted the Judge for failing to find that the claim by Mr. & Mrs. Walker was time barred. It was urged that Mr. Doshi, who sold and transferred the property to Mr. & Mrs. Walker, was brought into the action through issuance of a Third Party Notice; that the sale and transfer was in 2006, yet the Third Party Notice was issued on 13<sup>th</sup> December 2018 by which time the claim was statute barred; that time began to run in 2006, and that Section 26 of the *Limitation of Actions Act* on which the judge relied, does not apply as the same would only have applied if fraud was involved.
27. Counsel concluded by submitting that the learned Judge erred in failing to determine Mr. Doshi's claim for indemnity against the AG.
28. In substantially supporting the appeal (except the finding on limitation and the claim for refund of the purchase price) Miss. Baraza for Mr. & Mrs. Walker reiterated that Justice Chemutut's claim was based entirely on a letter of allotment, yet he readily conceded that he did not meet the conditions of the offer. It was submitted that Mr. & Mrs. Walker led evidence that they purchased the properties from Mr. Doshi in 2006 for Kshs. 7,500,000; that the properties were transferred and registered in their names in 2006; that in 2016-2017, they were informed by Mr. Doshi's former advocates about the need to rectify their titles, which was done.
29. As regards the proceedings before the NLC and the subsequent JR application, it was submitted that Mr. & Mrs. Walker were not privy; and that the parcels of land referred to by NLC are in any event different from theirs.
30. In relation to the contention by Mr. Doshi that the claim by Mr. & Mrs. Walker against him was barred by the statute of limitation, counsel submitted that the judge correctly applied Section 26 of the *Limitation of Actions Act*, which allows for an extension of the limitation period in cases of fraud or mistake; and that they only discovered the fraud or mistake when they were served with Justice Chemutut's claim in 2018; and that their claim falls under Section 36 of the *Limitation of Actions Act*, being a claim for restitution, a claim in equity, and that the same is therefore not time-barred.
31. Counsel also took issue with the award of costs by the Judge and urged that the same should have been ordered to be borne by the 4<sup>th</sup> to 8<sup>th</sup> respondents.
32. Mr. Munga for the Chief Land Registrar and the Attorney General, the 7<sup>th</sup> and 8<sup>th</sup> respondents, likewise supported the appeal. It was submitted that the legal status of a letter of allotment on which Justice Chemutut's claim is based is addressed in numerous court decisions; that an allotment letter does not confer title until the process is followed through and a title, the end product, is issued; that, based on the evidence, the titles issued to Mr. Doshi, and in turn those to Mr. & Mrs. Walker's titles were properly issued after following due process; that evidence was led that, following a re-survey in 1998, the survey plan relied upon by Justice Chemutut ceased to exist. Counsel urged the Court to allow the appeal and set aside the judgment of the ELC.
33. In opposing the appeal, Miss. Metto submitted that, based on the test on the degree of proof stated in the case of *Palace Investment Limited v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the ELC correctly found that Justice Chemutut discharged his burden of proof and established his claim to the properties; and that the onus now lay with Mr. Doshi to prove any irregularities in the recognition of Justice Chemutut's title to the properties.
34. It was submitted that Justice Chemutut was the first allottee of the properties which, prior thereto, were public land; that the offer contained in the letter of allotment did not lapse as the payment



made by Justice Chemutut was accepted; that, even if the offer had lapsed due to non-compliance, the acceptance of payment constituted a waiver. Moreover, the offer in the letter of allotment was never revoked and the properties were therefore not available for re-allocation. The case of Republic v City Council of Nairobi & 3 others [2014] eKLR was cited. On the other hand, it was submitted that the root of Mr. Doshi's title to the properties cannot be traced as he did not produce any letter of allotment or receipts for payment, and that his title to the properties is a nullity being a product of fraud; and that the learned Judge arrived at the correct decision.

35. According to counsel, having failed to provide evidence to support his claim to the properties, such as a letter of allotment or proof of payment, the logical inference is that Mr. Doshi's title was acquired fraudulently or unprocedurally. In that regard, counsel cited the decisions in Richard Kipmemoi Limo v Hassan Kipkemboi & 4 Others; and Kamau James Njendu v Serah Wanjiru & Another [2018] eKLR to support the argument that a title obtained irregularly or through fraud is not protected by law. It was urged that Mr. Doshi did not therefore have title capable of being passed to Mr. & Mrs. Walker.
36. It was submitted that Justice Chemutut held a valid title to the properties for over a decade before Mr. Doshi obtained title in 2003; that, under Section 26(1) of the *Land Registration Act*, a certificate of title is prima facie evidence of ownership unless proven to be obtained through fraud, misrepresentation, or illegal means; and that the title in favour of Justice Chemutut is indefeasible and the process leading up to its issuance complied with the law.
37. We have considered the appeal and re-appraised the evidence in accordance with our mandate under Rule 31 of the Court of Appeal Rules. We have also considered the submissions by learned counsel. The overarching question is whether, as the ELC found, Justice Chemutut proved his case against Mr. & Mrs. Walker to the required standard. In other words, whether Justice Chemutut established fraud on the part of Mr. & Mrs. Walker to impeach their titles to the properties. Within that issue, there are questions as to whether Justice Chemutut complied with the terms of the allotment and, if not, whether the offer lapsed on account of non-compliance with its terms; whether the letter of allotment conferred ownership rights; whether there was double or multiple allocation of the properties and, if so, which resulting title prevails; which title, between that of Justice Chemutut and that of Mr. Doshi is first in time; whether properties claimed by Justice Chemutut ceased to exist upon re-survey; whether Mr. & Mrs. Walker's claim against Mr. Doshi was time barred; whether Mr. Doshi's indemnity claim against the 8<sup>th</sup> Respondent was determined, and whether its dismissal breached his constitutional rights.
38. In addressing those issues, we begin with the observation that the suit before the ELC that culminated in the impugned judgment was instituted by Justice Chemutut against Mr. & Mrs. Walker. His action against Mr. & Mrs. Walker was founded on trespass on the basis that they had, without any colour of right, without authority or consent, entered and trespassed on the properties in respect to which he claimed to be the registered proprietor.
39. Trespass, as stated by this Court in the case of Charles Ogejo Ochieng v Geoffrey Okumu [1995] KECA 169 (KLR), is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. As for the ingredients of trespass, the Court in William Kamunge Gakui v Eustace Gitonga Gakui (Civil Appeal 16 of 2013) [2014] KECA 39 (KLR) stated that trespass is a violation of the right to possession, and that a plaintiff must prove that he has the right to immediate and exclusive possession of the land. Justice Chemutut did not name Mr. Doshi as a defendant in the suit.



40. Although fraud was not pleaded as against Mr. & Mrs. Walker in the body of the amended plaint, one of the reliefs that Justice Chemutut sought against them, and which was ultimately granted by the court, was a declaration that any title documents held by Mr. & Mrs. Walker “were obtained fraudulently, illegally and as such (are) null and void.”
41. Apart from the omission to plead fraud, nor particulars of fraud against the named defendants, Mr. & Mrs. Walker, were provided. In the often-cited decision of this Court in the case of Vijay Morjaria v Nansingh Madhusingh Dabar & Another [2000] eKLR, Tunoi, JA. stated that:
- “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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
42. In the same vein, the Court in the case of Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR reiterated that:
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v 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...”
43. Justice Chemutut therefore had the burden, beyond proof on a balance of probabilities required in ordinary civil cases, to impeach the title to the properties in favour of Mr. & Mrs. Walker. Did he do so?
44. In his evidence, Justice Chemutut adopted his witness statements to which we have already referred, and was cross-examined thereon. The factual basis on which Justice Chemutut asserts his claim to properties is not contested. Following his application to the Commissioner of Lands dated 3<sup>rd</sup> March 1992 approved by the former President H.E. Daniel Arap Moi on 9<sup>th</sup> May 1992, he was offered L.R. No. MN/III/432- 435 under a letter of allotment dated 5<sup>th</sup> June 1992 subject to “formal written acceptance” of the conditions and to the payment of charges prescribed in that letter. The area of the property was indicated as 10.79 acres approximately. He was to get a term of 99 years from 1<sup>st</sup> June 1992. The conditions included payment of a stand premium of Kshs. 180,000 and annual rent of Kshs. 36,000.
45. The letter of allotment stipulated that, if acceptance and payment respectively were not received within 30 days from the date of that letter, “the offer herein contained will be considered to have lapsed.” It was his testimony that he paid the requisite fees of Kshs. 441,000 on 20<sup>th</sup> May 1997, but that he was unable to develop the properties immediately due to demands of his duty as a judge. He explained that his efforts to obtain titles to the properties were frustrated by Ministry of Lands officials; that it was on further inquiry that he learnt on 17<sup>th</sup> May 2011 of the “fraudulent and unlawful” dealings with the properties by one Mr. Mwaniki on behalf of the Director of Surveys; that on 21<sup>st</sup> June 2011 and 13<sup>th</sup> March 2012, a Mr. Ngaruthi, acting on behalf of the Commissioner of Lands, fraudulently and



unlawfully issued an indent to the Director of Surveys and forwarded a grant of one of the plots to the Registrar of titles; and that he ultimately lodged a complaint with NLC on 16<sup>th</sup> September 2013.

46. In effect, for a period of over twenty years from 1992 when the properties were offered to him to 2013 when he lodged the complaint with NLC, Justice Chemutut's claim to the properties hinged entirely on the letter of allotment. As this Court stated in *Wreck Motor Enterprises v Commissioner of Lands & 3 Others* [1997] eKLR:

“...the endorsement or the appending of his signature by H.E. the President on the applications to the Commissioner of Lands for the suit plot or for that matter any other unalienated Government Land is not sufficient to grant title over any land to anyone. H.E. the President only approves the application for consideration by the Commissioner of Lands for allocation of any such property. It does not amount to the applicants obtaining title to such lands. 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.” [Emphasis added]

47. Thus, the letter of allotment on which Justice Chemutut hinged his claim to the properties was only a step in the process of acquisition of title thereto.
48. According to the evidence of Wilson Kibichi, the Assistant Director in the office of the Director of Survey in the Ministry of Lands, there were three survey plans covering the area where the properties are situated. It was his evidence that the first of such surveys was in 1959 as recorded in Plan No. F.R. 88/179, and that plot numbers 432 to 435 were based on that survey; that Justice Chemutut's letter of allotment was based on that survey, but that no Deed Plans were issued for plots MN/III/432-435, the subject of Justice Chemutut's letter of allotment.
49. Mr. Kibichi testified that a re-survey of the area was carried out in 1998 as captured in Plan No. F.R. 224/179 on the basis of which Deed Plans Numbers 219312 and 219313 in respect of LR Numbers MN/III/4393 and 4394 respectively were issued, which were originally registered in the names of Mr. Doshi; and that, based on a further survey plan, F.R. 566/20 in June 2014, LR Numbers MN/III/4393 and 4394 were sub- divided giving rise to the properties sold by Mr. Doshi to Mr. & Mrs. Walker.
50. There is no dispute that plot Numbers MN/III/432-435, as authenticated in 1959 survey and plot Numbers MN/III/4393 and 4394 as authenticated in the 1998 survey plan, “fall on exactly the same position of land on the ground” as confirmed in a report by Mashariki Geosurveys Limited dated 17<sup>th</sup> September 2019, and which forms part of the record before this Court. In other words, plot Numbers MN/III/432-435 and plot Numbers MN/III/4393 and 4394 occupy the same geographical position on the ground.
51. It is not entirely clear from the evidence how this situation came to be that plot Numbers MN/III/432-435 were extinguished, perhaps on account of the re-surveys, but the evidence shows that Mr. Doshi became the registered proprietor of plot Numbers MN/III/4393 and 4394 in 2003 when Grants in his favour were issued. He then subdivided the same into subdivision Numbers MN/III/4400 to 4407, but which were then rectified to MN/III/9876 to 9884.
52. By the time Mr. Doshi became registered as proprietor of plot Numbers MN/III/4393 and 4394, Justice Chemutut did not have title to plot Numbers MN/III/432-435. As already noted, for over twenty years (attributing his inaction to exigencies of duty of his office as judge), he did not perfect his title, and, arguably, the offer contained in the letter of allotment had in the meantime lapsed.



53. As stated by the Supreme Court of Kenya in *Torinon Enterprises Limited v Attorney General* (supra):

“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 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.”

54. It seems to us, based on the evidence, that by the time Justice Chemutut moved to NLC and subsequently applied for prerogative remedies in the Judicial Review proceedings before the ELC in JR Application No. 3 of 2016 that culminated in an order for him to be issued with and be vested with title for parcel Numbers MN/III/432-435, those references had long ceased to exist on account of the re-surveys to which we have already referred.

55. By the time Justice Chemutut moved to NLC in 2012, the titles in respect of plot Numbers MN/III/4393 and 4394 in favour of Mr. Doshi had long since been in existence having been issued in 2003. Grants No's. C.R. 37127 and C.R 37128 under the repealed Registration of Titles Act in respect of LR No. MN/III/4393 and MN/III/4393 granting Mr. Doshi leasehold interest for terms of 99 years from 1<sup>st</sup> July 1997 were registered in favour of Mr. Doshi on 23<sup>rd</sup> December 2003. That is to say, based on the evidence of Mr. Kibichi and the Land Registrar, when the provisional certificates of title for parcels Numbers MN/III/432-435 were being issued in 2017 pursuant to the orders granted by the ELC in the JR application, those parcel numbers no longer existed.

56. We conclude therefore that in allowing Justice Chemutut's claim, the learned Judge of the ELC did not consider, or adequately consider, the critical evidence of Mr. Kibichi and of the Land Registrar. Had the learned Judge done so, no doubt she would have reached a different conclusion.

57. As already indicated, Mr. & Mrs. Walker led evidence that they purchased subdivision No's. 4400, 4401 and 4402 (which were created upon subdivision of plot Numbers MN/III/4393 and 4394) from Mr. Doshi on the basis of an Agreement for Sale dated 12<sup>th</sup> May 2006, and the properties transferred to them by instrument of Transfer dated 22<sup>nd</sup> June 2006 and registered on 3<sup>rd</sup> August 2006. Under Section 23 of the repealed Registration of Titles Act, and under Section 26 of the *Land Registration Act*, they became absolute and indefeasible owners absent fraud or misrepresentation, or unless it was shown that the same was acquired illegally, unprocedurally or through a corrupt scheme, none of which has been proved.

58. We adopt, with necessary modification, the words of this Court in *Charles Ogejo Ochieng v Geoffrey Okumu* (supra) where the Court stated:

“Moreover, under section 23 (1) of the Registration of Titles Act the certificate of title in respect of LR 8530/130 and in possession of the respondent shall be taken by all Courts as conclusive evidence that the respondent is the proprietor of the said land as the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party. No particulars of fraud or misrepresentation were pleaded nor was any evidence led



to prove them. In our view the findings of the learned judge that the title of the respondent was indefeasible was correct.”

59. In our view, the title of Mr. & Mrs. Walker was demonstrably indefeasible. As already stated, beyond the sweeping claim by Justice Chemutut that the titles in favour of Mr. & Mrs. Walker were obtained illegally and unlawfully, no particulars of fraud were pleaded against them, and neither was any evidence led in support of those claims. As this Court stated in *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] KECA 816 (KLR) “fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.”
60. In view of the foregoing, we find that the learned Judge erred in concluding that Justice Chemutut had established his case to the required standard. That conclusion is based on a misapprehension of the evidence as the Judge failed to consider material evidence to which we have referred. We are therefore entitled to interfere with the judgment of the ELC. As held in *Mwanasokoni v Kenya Bus Services Limited* [1985] KLR 931, this Court will interfere with findings of fact by the High Court where the finding is based on no evidence, or on a misapprehension of the evidence, or where the judge is shown demonstrably to have acted on wrong principles in reaching the finding. See also *Mwangi v Wambugu* [1984] KLR 453.
61. Having concluded on the overarching issue in this appeal that Justice Chemutut did not establish his claim to the required standard, the secondary issues fall by the wayside, and we find it unnecessary to specifically address them.
62. In conclusion, we find that the appeal has merit and is hereby allowed. The judgement of the ELC in Malindi ELC No. 136 of 2018 is hereby set aside in its entirety. Costs of the appeal to the appellant to be borne by the 6<sup>th</sup> to 8<sup>th</sup> respondents.

**DATED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MAY, 2025.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CArb, FCIArb.**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

