**General & another v Hussein & 3 others (Civil Appeal 100 (ELD NO. 32) of 2018) [2025] KECA 1022 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1022 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT ELDORET**

**CIVIL APPEAL 100 (ELD NO. 32) OF 2018**

**JM MATIVO, PM GACHOKA & GV ODUNGA, JJA**

**JUNE 5, 2025**

**BETWEEN**

**THE ATTORNEY GENERAL ..... 1ST APPELLANT**

**THE COMMANDANT NATIONAL YOUTH SERVICE ..... 2ND APPELLANT**

**AND**

**ABDI ADAN HUSSEIN ..... 1ST RESPONDENT**

**SHIRE MAALIM OSMAN ..... 2ND RESPONDENT**

**IBRAHIM ABDULLAH KHALIF ..... 3RD RESPONDENT**

**THE KENYA COMMERCIAL BANK LIMITED ..... 4TH RESPONDENT**

***(Being an appeal from the judgment and decree in the Environment and Land Court of Kenya at Eldoret (A. Ombwayo, J.) dated 1st March, 2017 in ELC No.438 of 2013)***

## JUDGMENT

1. The crux of this dispute relates to the ownership of land parcel number Eldoret Municipality Block 15/20189 measuring approximately 2.00 Hectares situated in Eldoret Municipality (the suit land) which was initially registered in the name of Liberio Farm Limited, as per the certificate of lease issued on 3rd December 1997. The said company charged the land to the Kenya Commercial Bank Limited, (KCB) to secure a loan of Kshs.2,600,000/=. However, the said company defaulted in repaying the said loan prompting KCB to auction the land on 19th December 2007 in exercise of its statutory power of sale.

2. The 1st, 2nd and 3rd respondents emerged as the highest bidders in the said auction and purchased the said property for a consideration of Kshs.2,500,000/=. After the auction, the property was transferred into their names, but when they visited the land seeking to take possession, they were prevented by

officers from the National Youth Service (NYS) claiming that the land belonged to the NYS which had also erected structures thereon.

3. It was the 1st, 2nd and 3rd respondents' case that upon making inquiries at the offices of the Commissioner of Lands, they discovered that an allotment letter was erroneously issued over their land to the NYS, yet the same land had already been alienated, meaning, it was not available for alienation again. Consequently, the anomaly was corrected and the Commissioner of Lands issued a fresh letter of allotment Reference No. 299599/13 which omitted the suit land from the land allotted to the NYS and as a result the allotted land was reduced from 6.3 Hectares to 3.9 Hectares, but, notwithstanding the said correction,the NYS refused to vacate the suit land, eliciting the litigation before the trial court.

4. Vide an amended plaint dated 31st March 2014, the 1st, 2nd and 3rd respondents sued the appellants at the Environment and Land Court, (ELC), at Eldoret, in ELC No. 438 of 2013 seeking the following reliefs: (a) a declaration that the NYS and/or its officials were trespassers on the land; (b) an order directing the appellants or any officers subordinate to them to immediately give them unhindered access in and out of the said land and to vacate from the said land or be evicted therefrom under the supervision and direction of the commissioner of police or officers subordinate to him; (c) a declaration that the 1st, 2nd and 3rd respondents are bona fide purchasers for value without notice of any defects; (d) a declaration that the 1st, 2nd and 3rd respondents are the registered owners of the said land and any allotment after registration was null and void ab initio; (e) general damages and mesne profits; (f) costs of the suit; (g) interest on (e) & (f); (h) any other or further relief as the court may be pleased to grant.

5. In their defence dated 30th April 2009, the appellants averred that the suit land was at all material times the property of the Government which was being utilized by the NYS, therefore,Leberio Farm Limited, had no title or proper title to the land to pass to any person or entity, directly or indirectly and/or charge or transact or cause any transaction with regard to the title thereof as alleged in the plaint. Consequently, the purported allocation of the suit land to the Leberio Farm Limited and/or any other person or entity was illegal and it was obtained through fraud and misrepresentation, thus, it was void ab initio and it conferred no interest to Leberio Farm Limited, or any other person or entity.

6. The appellants also maintained that the issuance of the Certificate of Lease, if at all, together with the subsequent charge over the purported title and/or any subsequent act or omission by KCB or any person affecting the status and proprietorship of suit land were of no consequence as the original transaction thereto was effected by a person without authority to act as such. The appellants further maintained that the suit land was being used as a sports/athletics training facility for the NYS recruits in accordance with, and in pursuance of its mandate as stipulated in the law. Therefore, the appellants prayed for the suit to be dismissed with costs.

7. The 1st, 2nd and 3rd respondents in their reply to defence reiterated that the said property was registered in their names and it was not unalienated Government Land, nor could the Government put private land into utilization by the NYS. They also denied the allegation that Leberio Farm Limited acquired the land illegally and or fraudulently.

8. After considering the pleadings, evidence and submissions by counsel, the trial Judge isolated three issues for determination, namely; (a) Was the allocation of the suit land the Leberio Farm Ltd legal; (b) Was the plaintiff an innocent purchaser for value without notice; and (c) Whether the 2nd defendant has legitimate interest in the property.

9. Regarding the first issue, the learned judge held that Leberio Farm Ltd had a valid title, which it charged to KCB on 9th February 1999. Further, there is no dispute that the property was charged to KCB by Leberio Farm Ltd and that the chargor defaulted in paying the said loan, prompting KCB in exercise of

its statutory power of sale, to auction the land to the 1st, 2nd and 3rd respondents, who were the highest bidders, and who acquired title to the property.

10. On the second issue, the learned judge held that the appellants had not demonstrated that the 1st, 2nd and 3rd respondents had prior notice of irregular exercise of the statutory power of sale by KCB or indeed whether the statutory power of sale was irregularly exercised. It was the court's finding that as per the 1st plaintiff's testimony, the decision to purchase the property was pursuant to the advertisement in the newspaper.

11. As for the third issue, the learned judge held that the 1st, 2nd and 3rd respondents had established on a balance of probabilities that they were the legal owners of the suit land and that the appellants failed to prove that the 1st, 2nd and 3rd respondents obtained their title fraudulently or illegally. It was the trial court's finding that nothing turns on the Part Development Plan (PDP) marked as defence exhibit no. 2 as it was never registered.

12. Ultimately, the learned judge entered Judgment in favour of the 1st, 2nd and 3rd respondents in the following terms: (a) a declaration that the 1st, 2nd and 3rd respondents are bona fide purchasers for value without notice of any defect of the suit-land;

    (b) a declaration that the 1st, 2nd and 3rd respondents are the registered owners of the suit land and that any allotment after registration was null and void ab initio; (c) that the 2nd appellant and or officers from the NYS are trespassers on the said land; (d) an order directing the appellants and or any officer sub-ordinate to them to immediately give the 1st, 2nd and 3rd respondents unhindered access in and out of the suit land and to vacate the said land or be evicted therefrom under the supervision and direction of the commissioner of police and or any other officer sub-ordinate to him; (e) general damages and mesne profits were not proved and therefore are not granted; (f) costs of the suit plus interest are awarded to the 1st, 2nd and 3rd respondents.

13. Aggrieved by the said decision, the appellants have appealed to this Court citing 9 grounds in their memorandum of appeal dated 7th August 2018. Essentially, they fault the learned judge for: (a) holding that the allocation of the suit land to Leberio Farm Limited was legal despite absence of a letter of allotment to the said company, and lack of evidence that the said company complied with all statutory requirements for allocation of public land; (b) holding that the questioned allocation was legal yet the letter of allotment relied upon was in respect of an unsurveyed plot 'A' measuring 0.5 hectares situated along Sergoit Road, opposite Prisons Primary School and issued to Naruna Enterprises contrary to the evidence that the suit premises measures 2.0 hectares is situated along Kipkaren Road next to Rivatex Factory, adjacent to Wareng Secondary School along Eldoret-Kisumu road;

    (c) finding in favour of 1st , 2nd and 3rd respondents despite lack of evidence that they acquired the said land from Naruna Enterprises, the alleged allottee, and in absence of evidence of the relationship between Naruna Enterprises and Leberio Farm Ltd. or any relationship between the land allegedly allocated to Naruna Enterprises and the suit property; (d) ignoring or failing to take into account the appellants' evidence that the title issued to Leberio Farm Limited was acquired unlawfully, irregularly and unprocedurally, hence, the 4th respondent could not purport to transfer any good or better title to the 1st, 2nd and 3rd respondents than was held by Leberio Farm Limited; (e) finding that the 1st, 2nd and 3rd respondents were bona fide purchasers for value without notice despite evidence that they failed to inspect the suit property before purchasing or reasonably exercise due diligence to ascertain the legality of the title sought to be sold by public auction or the occupation status of the land before committing their finances; (f) failing to appreciate that the suit land was public land and was part of a larger

parcel of land alienated vide PDP Ref. ELD/17 /87 /13 which was signed and approved by the Director of Physical Planning and the Minister of Lands and Settlement and registered as PDP Ref. ELD/17/87 /13A and No. 426, hence the same was not available for further allocation to Leberio Farm Limited or any other person, therefore, the title issued to the 1st,2nd and 3rd respondents was null and void ab Initio; (g) ignoring the appellants' evidence that the suit land was public land which was occupied, possessed and utilized by the Eldoret NYS Camp and public interest militated against the 1st, 2nd and 3rd respondents' alleged interest in the land; (h) failing to take notice that KCB which allegedly exercised statutory power of sale did not respond to allegations of fraud levelled against it; (i) selectively applied the principles of legitimate expectation and made a finding that is outside the law and the decision is therefore without substance, full of inconsistencies and was arrived at in a cursory and perfunctory manner.

14. During the virtual hearing of this appeal on 10th March, 2025, Mr.Odongo learned counsel for the appellants and Mr. Mathai learned counsel for the 1st, 2nd and 3rd respondents adopted their written submissions dated 5th February, 2024 and 1st January 2014 respectively. KCB did not participate in this appeal nor did they participate in the proceedings before the trial court.

15. In his submissions in support of the appeal, Mr. Odongo condensed the appellants' 9 grounds of appeal into three broad issues. He combined grounds 1, 2, 3 & 4 into one broad ground basically faulting the learned judge for holding that the said land was lawfully and regularly allocated to Leberio Farm Ltd, and upholding all subsequent transactions including the registration of the charge, exercise of statutory power of sale and transfer to the 1st, 2nd and 3rd respondents. Mr. Odongo submitted that the trial judge rightly found that the genesis of the suit land was traceable to a letter of allotment No. 3710/ XXXV dated 8th June 1995 in favour of Naruna Enterprises which was in respect of an unsurveyed plot "A" measuring 0.5 hectares situated along Sergoit Road opposite prisons primary school, and that the allotment had a part development plan No. ELD/17/94/78 attached to it, and that the court was not told how Leberio Farm Ltd became the registered proprietor of the land. Therefore, the said land could not have been a resultant of the allotment to Naruna Enterprises because the two parcels were in two different geographical locations, 10 kms apart and registration Sections with unsurveyed plot "A" failing within Eldoret Municipality Block 10 while the suit land falls within Eldoret Municipality Block 15. Further, the land allocated to Naruna Enterprises was unsurveyed plot "A" measuring 0.5 hectares while the suit land measures 2.00 hectares.

16. The appellants maintained that having challenged the root of the title held by the1st, 2nd and 3rd respondents, it was incumbent upon the trial judge to unearth what happened between Naruna Enterprises and the registration of the title in favour of Leberio Farm Ltd instead of relying on the title that was being dangled before him and in the process ended up sanctioning an illegality by upholding all the subsequent process including registration of the suit land to Leberio Farm Ltd which was irregular and void. For authority, Mr. Odongo cited this Court's decision in Funzi Development Ltd & Others v County Council of Kwale, Mombasa Civil Appeal No. 252 of 2005 [2014] eKLR where it held that a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular and that a court cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.

17. Regarding the failure to join Leberio Farm Ltd in the suit, Mr.Odongo maintained that a court of law should never sanction apparent illegalities on the premise of non-joinder or mis-joinder. Counsel cited the Supreme Court decision in Dina Management limited v County Government of Mombasa & 5 Others (Petition 8 (E010 of 2021) [2023] KESC 30 (KLR) in which the allocation of land to H.E Daniel T. Arap Moi was nullified even though he was not a party in the suit.

18. It was also submitted that the learned judge selectively applied the provisions of Section 26 of the *Land Registration Act* to find that the proprietor must have been aware of the vitiating factors before his/her title is cancelled as provided under Section 26 (1) (a). It is the appellants' case that the learned judge disregarded Section 26 1.(b) which allows the courts to cancel titles on grounds of illegalities, notwithstanding that the illegalities had been pleaded.

19. Regarding the failure to find that the suit land was part of a 6.3 hectares of land reserved for the Eldoret NYS camp (Grounds 6 & 7), Mr. Odongo maintained that no evidence was led to show how the property moved from Naruna Enterprise to Leberio Farm Ltd or whether either Naruna Enterprises or Leberio Farm Ltd complied with the conditions of allocation including acceptance of the offer and payment of stand premiums within 30 days of the post mark and no evidence was led to show as at the time of the alleged transfer from Naruna Enterprises to Leberio Farm Ltd, the interest in the said letter of allotment had crystalized and therefore, the conclusion that the suit land became private property in 1997 was thus without any basis in law or fact. To buttress his submission counsel cited the Supreme Court in Torino Enterprises Limited v Attorney General (petition 5(E006 of 2022) [2023] KESC 79 (KLR) where it was held that an allotment letter cannot pass a good title.

20. It is the appellants' case that it was a misdirection on the part of the learned judge to find that PDP Ref. ELD/17/87/13 was never registered when the only a single PDP can be approved and be registered for every single parcel of land and in this particular instance, the only known PDP was PDP Ref. ELD/17/87/13 which was prepared on 17th October 1987 for proposed NYS Camp and registered as PDP Ref. ELD/17/87/13A and assigned PDP No. 426 and that no other PDP was ever issued in relation to the suit land and that it was also confirmed that the PDP in favour of the 2nd appellant had never been altered or amended to exclude any portion including the suit land. Furthermore, DW2 confirmed that the PDP Ref ELD 17/94/78 /13 attached to the letter of allotment issued to Naruna Enterprises was not in their records and in any event it was of a different parcel of land not related to the suit.

21. Mr. Odongo also submitted that the 1st, 2nd and 3rd respondents were not innocent purchasers for value since the NYS has always been in possession of the land. He asserted that this fact was confirmed by the 1st, 2nd and 3rd respondents in their evidence that when they attempted to take possession of the land, they found NYS in occupation, despite them having the title document. Mr. Odongo was emphatic that possession is nine-tenths ownership and it ought to be treated as an overriding interest on the title. In support of this proposition, he cited this Court's decision in Henry Muthee Kathurima v Commissioner of Lands & Ano. [2015] eKLR.

22. Counsel further submitted that it was wrong for the trial court to find that the 1st, 2nd and 3rd respondents were innocent purchasers for value (Grounds 5, 8 & 9). He maintained that it was PW1's testimony that he learnt about the auction on 13th December 2007 through a public notice advertising the auction that was to take place on 19th December, 2007. Therefore, PW1 had six days to inspect the land and be satisfied that it was clean. Further, on cross-examination, PW1 admitted that he did not inspect the land until after he obtained the title several months later and that is when they discovered that the 2nd appellant was already in occupation which made DW1 and DW2 conclude that the 1st, 2nd and 3rd respondents were not diligent or innocent purchasers for value without notice.

23. Mr. Odongo also submitted that while Section 99 of the *Land Act* immunizes a person claiming interest in land acquired by dint of exercise of statutory power of sale, a holistic interpretation of Section 99 leads to an inescapable conclusion that the immunity to the purchaser of land in an auction is circumscribed since the appellants are not questioning whether the power of sale was conducted lawfully, but, they are contesting the root of the title held by Leberio Farm Ltd, and in any event, the

appellants were not party to the auction, hence Section 99 is inapplicable. To buttress this submission, counsel cited this Court's decision in *Flemish Investment Ltd v Town Council of Mariakani, CA No. 30 of 2015* that a bona fide purchaser exercising due diligence would be expected to inspect the property he is buying to ascertain its physical location, persons if any, in occupation, developments, buildings and fixtures thereon among others.

24. On behalf of the 1st, 2nd and 3rd respondents, Mr. Mathai submitting on grounds 1, 2, 3 and 4, urged that the genesis of the suit land was the allotment letter ref no. 3710xxxxv dated 8thJune, 1995 in respect of the unsurveyed plot No. "A" in Eldoret Municipality, which was issued to Naruna Enterprises Limited which was approved on 27th November, 1994 and the land was later registered in the name of Leberio Farm Ltd.

25. Counsel maintained that even though fraud was alleged, it was not proved because Leberio Farm Ltd was not enjoined in the suit and as a result fraud could not be proved as against a person who was not party to the suit. Nevertheless, Mr. Mathai argued that it is settled law that where one intends to impeach a title on grounds that it was procured through fraud or misrepresentation, he must prove that the title holder was party to the fraud or misrepresentation as was held in Alice Chemutai Too v Nickson Kikurui Korir & 2 Others [2016] eKLR

26. Mr. Mathai further submitted that there was no evidence that the land was set apart by the Government as public land or it is Government land which was alienated as alleged. Further, the 2nd appellant's allotment letter was issued on 8th March 2007, by which time the land was already registered in the name of a private person and a Certificate of Lease issued on 3rd December 1997. Counsel maintained that the PDP that was produced as defence exhibit 2 was approved on 5th June 2000 by the Director Physical Planning, Ministry of Works and Housing and the Ministry of Lands and Settlement. However, the same was not registered by the Commissioner of Lands as admitted by DW2 and by that time, the land had already been alienated. Therefore, the learned judge did not err in finding that Leberio Farm Ltd had a valid title, which it charged to KCB, which sold the land to the highest bidders, (the 1st, 2nd and 3rd respondents), at the public auction, and upon paying the full purchase price, they obtained a good title.

27. On the question whether the 2nd appellant had a legitimate interest in the land, Mr. Mathai submitted that the 2nd appellant was issued with a letter of allotment for 6.3 hectares vide ref. No. 215338/103 on 8th March 2007, and during that time part of the 16.3 acres had already been alienated and had become private land, therefore, the land was not available for allocation. The second allotment was issued on 9th September,2008 to the 2nd respondent vide reference no. 259588/13, and, the earlier allotment letter of 8th March 2007 Ref. No. 215338/103 was cancelled. Hence, the appellants were attempting to circumvent the law by alienating government land that had already been alienated when the land was allocated to them for a term of 99 years.

28. On whether the 1st, 2nd and 3rd respondents were innocent purchasers for value without notice of any fraud or misrepresentation, Mr. Mathai contended that since the appellants did not demonstrate fraud on the part of the 1st, 2nd and 3rd respondents, in absence of evidence of illegality and corruption in the acquisition of title, they were innocent purchasers for value without notice of any fraud, nor were they guilty of fraud.

29. This is a first appeal, therefore, it is by way of retrial. The principles upon which this Court acts in such an appeal are well settled. Briefly, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. However, this Court can only interfere with the trial court's findings of fact if it appears either that the trial judge failed to take into account

relevant considerations or has taken into account irrelevant considerations. (See Abdul Hameed Saif v Ali Mohamed Sholan [1955], 22 E. A. C. A. 270).

30. Upon carefully considering the record of appeal, the impugned Judgment, the grounds of appeal, the parties' submissions, and the law, we find that two issues will effectively address this appeal,namely; (a) whether the land was lawfully and regularly allocated to Leberio Farm Ltd, and, (b) whether the 1st, 2nd and 3rd respondents are innocent purchasers for value without notice.

31. As we search for an answer to the first issue, it is important to underscore that this dispute concerns ownership of Eldoret Municipality Block 15/20189 measuring 2.00 hectares situated in Eldoret Municipality. The ownership of the land is being claimed by the NYS who are in possession, and the 1st, 2nd and 3rd respondents who claim to have lawfully acquired the same land. In support of this, they maintain that they hold a valid Certificate of Lease issued in their favour. To effectively resolve the parties conflicting claims to the disputed land, it is necessary to interrogate the root of the title for both parties. The root of title is the deed to which title to a property is ultimately traced to prove that the owner has a good title. Put differently, when a court is faced with a claim such as in this case, it must scrutinize the root of the title and follow all processes and procedures that brought forth the two titles at hand. The parties to such litigation must always bear in mind that their title is under scrutiny, and they need to demonstrate how they got their title starting with its root.

(See Hebert L. Martin & 2 others v Margaret J. Kamar & 5 Others [2016] eKLR).

32. The elements for a good root of title were recently listed by this Court in Presbyterian Foundation vs Kibera Siranga Self Help Group Nursery School [2025] eKLR as follows: (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question; (b) it must contain a recognizable description of the property; and, (c) it must not contain anything that casts any doubt on the title. Bearing in mind these elements, we will examine the parties' respective explanations regarding the origin of the titles/ownership.

33. The appellants' case is that only a single PDP can be approved and registered for a parcel of land. They maintained that for this particular land, the only PDP issued was PDP Ref. ELD/17/87/13 which was prepared on 17th October 1987 for proposed NYS Camp and registered as PDP Ref. ELD/17/87/13A and assigned PDP No. 426, and that no other PDP was ever issued in respect of the said land, nor was the PDP in favour of the 2nd appellant ever been altered or amended to exclude any portion including the suit land. Furthermore, DW2 confirmed that the PDP Ref ELD 17/94/78/13 attached to the letter of allotment issued to Naruna Enterprises was not in their records and in any event it was in respect of a different parcel of land not related to the suit.

34. The appellants alleged fraud and misrepresentation and questioned the procedure that led to issuance of the letter of Allotment to Liberio Farm Ltd. They insisted that the NYS was already in occupation, therefore, the land was not available for allocation. It was their position that the land allegedly allocated to Liberio Farm Limited was at a totally different location, 10 Kilometres away from their land. They also asserted that the decision to issue titles to all the parcels owned by the NYS was made vide letter dated 22nd June, 1998, by the office of the President, through the Permanent Secretary, One Mr. Joshua P.K. Matui to the permanent secretary Ministry of lands requesting issuance of title deeds for all NYS camps.

35. On the other hand, the 1st, 2nd and 3rd respondents claimed that they purchased the land at a public auction conducted by KCB in exercise of its statutory power of sale, and that a Certificate of Lease was issued to Leberio Farm Limited on 3rd December, 1997.

36. As mentioned earlier, the 1st, 2nd and 3rd respondents' case is that the land was initially registered in the name of Liberio Farm Limited, as per the certificate of lease issued on 3rd December 1997. However, the 1st, 2nd and 3rd respondents did not call the directors of the said company as witnesses to shed light on how they acquired the land. In Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd [1979] (1) SA 621 (A) it was held that:

> " where a party fails to call as his witness as one who is available and able to elucidate the facts, whether the inferences that the party failed to call such a witness because he feared that such evidence would expose facts unfavourable to him should be drawn would depend on the facts peculiar to the case where the question arises."

37. In Just Names Properties II CC & Another v Fourie & Others 2007 (3) SA. 1 (W) the court held that:

> " In the present matter I am not persuaded that an inference against the Defendant should not be drawn from the fact that they did not call Oosthuizen as a witness. There were many issues that called out for her testimony. This was not forthcoming. I was not informed as to what the reasons for her nonappearance was. Strictly speaking, I am not entitled to an explanation, however, at the end of the day, I must draw certain reasonable inferences from such a decision..."

38. In the instant case, there are many issues which required elucidation by Liberio Farm Ltd. The omission to call the said witnesses not only raises the need to draw reasonable inferences from their omission, but also means that the 1st, 2nd and 3rd respondents did very little to explain the root of the title they claim to have genuinely acquired. The general rule in civil cases is that the party who has the legal burden also has the evidential burden, and if he/she does not discharge this legal burden, then his/her claim will fail. It is evident that the 1st, 2nd and 3rd respondents' Certificate of Lease was under challenge. Therefore, the procedure that was followed by Liberio Farm Ltd to acquire the land was in law a fact in issue. Facts in issue are the central contentions upon which a dispute is centered. The *Evidence Act* defines a fact in issue in Section 3 (1) (d) as follows:

> " fact in issue" means any fact from which, either by itself or in connexion with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows.

39. The Law of Evidence, in all its complex glory, naturally revolves around two cardinal things: facts and proof. It is these two that combine to form evidence, which the court may or may not accept as showing the merit or otherwise of a party's case. Some facts are however more important than others and it is not just expected but demanded that these facts be proved by the party seeking to rely on them. Section 3 (2) & (3) of the *Evidence Act* provides as follows:

    2. A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.

    3. A fact is disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its nonexistence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.

40. Section 107 (1) of the *Evidence Act* provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts

exist. Sub-Section (2) of the said provision provides that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. In terms of Section 108 of the *Evidence Act*, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The inquiry whether the 1st, 2nd and 3rd respondents discharged this burden leads us to the question whether they satisfactorily explained the root of their title. We have re-evaluated the entire record. The appellants having alleged fraud, and/or misrepresentation on the part of Liberio Farm Ltd and having asserted that the title was irregularly, the 1st, 2nd and 3rd respondent were obligated to adduce evidence to demonstrate the root of the title, because the title was under attack. We find that there was no effort to explain the process that resulted in the registration of the land in the name of Liberio Farm Ltd.

41. Regarding the genesis of the title, the learned judge had this to say:

> " The genesis of this parcel of land is the allotment letter ref. No. 3710/XXXV dated 8.6.1995 in respect of the unsurveyed plot No. "A" in Eldoret Municipality. The allotment letter was issued to Naruna Enterprises Limited of P. O. Box 1464, Eldoret. The Part Development Plan No. Eldoret/17/94/78 was forwarded to the Commissioner of Lands and approved by the Commissioner of Lands on 27.11.1994. That is so far as regards the letter of allotment. We are not told how Leberio Farm became registered as the proprietor of the plot which later came to be known as Eldoret/Municipality/Block 15/2089. The defendants allege fraud; however, it is not clear against whom as they have not enjoined Leberio enterprises as the alleged fraud cannot be visited upon the plaintiff who purchased the property at a public auction. The defendants have not demonstrated by evidence that the said Leberio Farm Ltd were illegally or fraudulently registered as the proprietors of the parcel of land. The certificate of lease having been issued to Leberio Farm Limited, the said farm became the registered proprietor of the parcel of land...
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> a. No evidence has been brought before court that there was no letter of allotment to Leberio ltd or Naruna enterprises or that the letter of allotment in respect of the parcel of land issued to Naruna Enterprises was issued fraudulently or illegally and that no evidence has been availed to suggest that the certificate of lease issued to Leberio was issued fraudulently or illegally. I do therefore, find that Leberio Farm Ltd held a valid title being a certificate of lease in respect of the suit property. There is no evidence that the suit land was land set apart by the government of Kenya as public land or that the suit land is unalienated government land...
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> b. This court finds that by the date the 2nd respondent was being issued by the allotment letter for the suit property on the 8th March 2007 the parcel of land herein had ceased being unalienated government land and was registered in the names of a private person and title in the form of a certificate of lease issued on 3/12/1997 under the registered *land Act* cap 300 laws of Kenya repealed. The Part Development Plan produced as Defence Exhibit 2 was approved on 5/6/2000 by the director physical planning ministry of works and housing and the ministry of lands and settlement however the same was not registered by the commissioner of lands as admitted by the PW2 and that the status of the land had already changed to alienated government land.."

42. We agree with the trial judge only to the extent that we are unable to decipher how Liberio Farm Ltd became registered as the proprietor of the plot which later came to be known as Eldoret/Municipality/

Block 15/2089 (the suit land). The 1st, 2nd and 3rd respondents contended that the said land was not available to be allotted to the 2nd appellant because having been alienated to Liberio Farm Ltd, it became private property on 27th November 1994 while the 2nd appellant was allotted the land on 8th March 2007. The question is whether the said assertion, attractive as it is, viewed with the totality of the evidence adduced, satisfied the legal parameters for explaining the 1st, 2nd and 3rd respondents' root of their title. The legal parameters for determining the root of a title were elucidated by the Supreme Court in the case of Dina Management Limited v County Government of Mombasa & 5 Others (supra) where the Court cited with approval the case of Nelson Kazungu Chai & 9 Others v Pwani University [2014] eKLR thus:

> "...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees.
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> 131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013 where Njagi J held as follows:
>
> > "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot
>
> 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed..."
>
> 105. This process is restated in *African Line Transport Co Ltd v Attorney General, Mombasa, HCCC No 276 of 2003*[2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot."

43. Section 26 of the *Land Registration Act*, 2012 provides:

> "26. (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

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

44. The Supreme Court in Dina Management Limited v County Government of Mombasa & 5 Others (Supra) held that:

> " 107 (a) ...It has not been disputed that indeed there was no evidence produced of the letter to the Commissioner of Lands seeking allocation of the suit property by the first registered owner, and there was no PDP before the survey was done. We therefore agree with the trial court and the appellate court that the allocation of the suit property to HE Daniel T. Arap Moi was irregular.
>
> a. 108. As we have established above, before allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of Funzi Development Ltd & others v County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR the Court of Appeal, which decision this court affirmed, stated that:"...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title."

45. This Court in Korir v Njoki *& Ano. (Civil Appeal 34 of 2020)* [2023] KECA 439 (KLR) held as follows:

> " In this case, the appellant's title was being challenged on the ground that the proprietors of the suit land were not aware of the circumstances under which he allegedly acquired interest thereunder. It was that very title whose authenticity was in dispute. In those circumstances he could not just come to court and place the very same title before the court and claim that the evidence was sufficient. He ought to have gone further and explained the process by which he obtained the said title. In this case there was no such evidence and since he was not physically involved in the transaction, he ought to have called the person who transacted on his behalf even if he could not call the alleged seller."

46. In the case of Elizabeth Wanjiru Githinji & 29 Others v Kenya Urban Roads Authority [2019] eKLR, this Court held as follows:

> " ...it is not sufficient for the appellants to wave an RLA or RTA title and assert indefeasibility. If a mistake is proved or total failure of consideration or other vitiating constitutional or statutory factors, an RLA or RTA title is defeasible."

47. This Court in *Munyu Maina v Hiram Gathiha Maina (Civil Appeal 239 of 2009)* [2013] KECA 94 (KLR) (10 December 2013) (Judgment), stated as hereunder;

> "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. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony."

48. In Henry Muthee Kathurima v Commissioner of Lands & Ano. [2015] eKLR while holding the doctrine of indefeasibility of title has limitations where it is shown a title was procured fraudulently or unprocedurally, the court stated thus:

> "...We have considered the provisions of Section 26 of the *Land Registration Act* in light of the provisions of article 40(6) of *the Constitution* and it is our considered view that the concept of indefeasibility of title is subject to article 40(6) of *the Constitution*. Guided by the provisions of article 40(6) of
>
> *the Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired..."

49. As alluded to earlier, we agree with the learned judge that it was not demonstrated how Liberio Farm Ltd obtained the registration of its land. However, the learned judge in finding that the appellants did not prove fraud on the part of Liberio Farm Limited, failed to appreciate that the 1st, 2nd and 3rd respondents did not demonstrate how the letter of allotment issued to Naruna Enterprises which was for an unsurveyed plot 'A' measuring 0.5 Hectares became the suit land measuring 2.00 hectares. Furthermore, the learned judge failed to appreciate the uncontroverted evidence tendered by DW1, clearly stating that the land allegedly allocated to Naruna Enterprises measuring 0.5 hectares was located within Eldoret Municipality Block 10 while the suit land falls within Eldoret Municipality Block 15 and the two parcels are 10 kms apart. There is unrebutted evidence that the above two parcels fall within totally different adjudication areas. These glaring disparities are enough to taint the 1st, 2nd and 3rd respondents' title.

50. It is also important to mention that the learned judge did not accord weight to the appellants' uncontroverted evidence that the only known PDP issued was PDP Ref. ELD/17/87/13 which was prepared on 17th October 1987 for the proposed NYS Camp and registered as PDP Ref. ELD/17/87/13A and assigned PDP No. 426 and that no other PDP was ever issued in relation to the suit land and that it was also confirmed that the PDP in favour of the 2nd appellant had never been altered or amended to exclude any portion including the suit land. This evidence was never controverted. Also telling is the uncontroverted evidence of DW2 who confirmed that the PDP Ref ELD 17/94/78/13 attached to the letter of allotment issued to Naruna Enterprises was not in their records and in any event, it was in respect of a different parcel of land not related to the suit land. Accordingly, by upholding the respondent's title which was not supported by a PDP, the learned judge fell into a grave error.

51. It will suffice for us to underscore that the issues highlighted above directly speaking to the legality of the title issued in favor of the Liberio Farm Ltd, which was ultimately passed to the 1st, 2nd and 3rd respondents fall within the circumscription of the provisions of Section 26 (1) (b) of the *Land*

*Registration Act*, 2012 and hence, the learned judge erred in failing to find and hold that the process leading to the issuance of the title to Liberio Farm Ltd. was vitiated by illegalities.

52. We now turn to the question whether the 1st, 2nd and 3rd respondents are innocent purchasers for value without notice.

Addressing this issue, the trial judge had the following to say

> " I do find that the plaintiffs saw an advertisement by Wagly Auctioneers on the Daily Nation that the suit land would be sold in a public auction. The conditions of sale were set out in the advertisement. A deposit of 25% was to be paid in cash or bank cheque at the fall of the hammer and the balance was payable within a period of 30 days from the date of auction. The plaintiffs attended the auction and became the highest bidders at a consideration of Kshs.2,500,000/= in which they paid Kshs.625,000/= at the fall of the hammer and the balance of kshs.I,825,000/= was paid latter. I do find that they were innocent purchasers for value without notice of any fraud and that they were not guilty of any fraud."

53. The Black's law Dictionary, 10th Edition defines a "bona fide purchaser" as one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims. This Court in Lawrence P. Mukiri v Attorney General & 4 Others [2013] eKLR defined a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. Also, in Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR cited the Uganda Court of Appeal decision in Katende v Haridar & Company Ltd, which defined a bona fide purchaser for value inter alia:

> " a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:
>
> 1. he holds a certificate of Title
> 2. he purchased the Property in good faith;
> 3. he has no knowledge of the fraud;
> 4. he purchased for valuable consideration;
> 5. the vendors had apparent valid title;
> 6. he purchased without notice of any fraud;
> 7. he was not party to any fraud.
>
> b. A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner."

54. To be considered a bona fide purchaser for value, one must prove; that they acquired a valid and legal title, secondly, that they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly, that they paid valuable consideration for the purchase of the suit property. (See Samuel Kamere v Lands Registrar, Kajiado [2015] eKLR). However, the protection offered to a bona fide purchaser for value without notice does not apply where the title to the property was obtained irregularly or illegally. As was held by the Supreme Court in Dina Management

v County Government of Mombasa (Supra), a title document can be invalidated if it is proven that the initial allocation process was illegal or unprocedural.

55. Therefore, a title document is not sufficient proof of ownership of property where the origin of that title has been challenged. The holder of the title document must go beyond the instrument itself and show that the process of acquisition from inception was both legal and procedural, and that he qualifies as a bona fide purchaser for value. The onus is on the purchaser to carry out the necessary due diligence before purchasing property to establish whether there is good title to pass by looking into the root of the title. (See this Court's decision in Galaxy Realtors Limited v Kenya Forest Service [2024] eKLR). As the decisions cited above suggest, a purchaser has a duty to conduct due diligence to establish the root of the title in order to fit within the definition of a bona fide purchaser. As was stated by this Court in Said v Shume & 2 Others (Civil Appeal E050 of 2023) [2024] KECA 866 (KLR) (26 July 2024) (Judgment):

> " ...Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase." And as in the Supreme Court decision in Dina Management Limited vs County Government of Mombasa (supra), the Court went on to hold that, once the root of the title has been challenged, a party cannot derive benefit from the doctrine of bona fide purchaser.'

56. The issue under consideration now narrows to whether or not the 1st, 2nd and 3rd respondents have satisfied the requisite legal parameters to qualify as bona fide purchasers for value. PW1 testified that they learnt about the intended auction on 13th December, 2007 through a public advertisement. The auction was scheduled for on 19th December, 2007. On cross-examination, he was emphatic that they did not visit the land prior to the auction. It was his evidence that it was only after the auction and after obtaining the Certificate of Lease, which was several months later that they discovered that the land was occupied by the NYS whom according to them are trespassers. In our view, due diligence reasonably required the 1st, 2nd and 3rd respondents to inspect and ascertain the status of the land on the ground and satisfy themselves on the status of the land was unoccupied. Prudence required that they dig deeper into root of the title. There is uncontroverted evidence that the letter of allotment was for a different parcel of land. As highlighted earlier, there is an unexplained glaring disparity on the acreage stated on the letter of allotment and the land they claim to have bought. There is no explanation or evidence rebutting the assertion that the land they were allocated is 10 km away from the land they claim was allotted to them. Had the 1st, 2nd and 3rd respondents exercised due diligence, they would have discovered the discrepancies highlighted above. They would have confirmed that the NYS were in occupation. It is our view that had they undertaken due diligence, they would have arrived at an informed decision whether or not to bid in the auction. As this Court stated in Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [supra], only a foolhardy, and we may add, a careless or fraudulent investor would purchase land such as the suit property "with the alacrity of a potato dealer in Wakulima Market." Accordingly, we find that the 1st, 2nd and 3rd respondents cannot satisfy the elements of an innocent purchaser for value discussed earlier.

57. Lastly, arising from our determination of the issues discussed above, and the conclusions arrived at, it is our finding that the allocation of the suit land to Liberio Farm Limited was unlawful, illegal and irregular. The law offers no protection to a bona fide purchaser who cannot demonstrate a good root of title. It is important to underscore that Section 26 of the *Land Registration Act* provides that a Certificate of Title is conclusive evidence of proprietorship provided it is not linked to fraud or misrepresentation in which the person is party to. Even though the law provides for the principle

of indefeasibility of title, the same is not absolute. The title should not have been acquired illegally, unprocedurally, or through a corrupt scheme. 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. (See Munyu Maina v Hiram Gathiha Maina [2013] eKLR).

58. Therefore, it is our finding that the learned judge erred in upholding the validity of a title whose root and acquisition was evidently marred by procedural irregularities. The trial court ignored the glaring irregularities highlighted above. We note that the appellants had pleaded fraud and or misrepresentation in their defence. On the face of the evidence adduced before the trial court and the irregularities stated above, it is our view that the trial court did not accord weight to the compelling evidence adduced by the respondent and ignored glaring gaps in the 1st, 2nd and 3rd respondents' evidence as a consequence of which it arrived at an erroneous finding.

59. The appellants in the defence pleaded fraud and mis- representation. However, they did not pray for the cancellation of the 1st, 2nd and 3rd respondents' title. They did not plead a counter claim in their defence. However, as was held by this Court in Mithamo & Ano. v Mithamo (Civil Appeal 76 of 2022) [2024] KECA 1864 (KLR) (20 December 2024) (Judgment),

> " While it is desirable that where necessary the pleadings should be amended to bring in all the issues, Odd Jobs vs Mubia [1970] EA 476, remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue, the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court."

60. A reading of the evidence adduced before the trial court some of which we have highlighted above, and cursory look at the grounds of appeal and the parties' submissions before us clearly show that the legality of the 1st, 2nd and 3rd respondents' title was in question. It is therefore, our view that the parties having extensively submitted on the validity of the 1st, 2nd, and 3rd respondents' title left it to the Court to determine its validity. In fact, one of the prayers in the appeal seeks cancellation of the title. Having not determined that issue, Section 3(2) of the *Appellate Jurisdiction Act* which clothes this Court with jurisdiction provides that:

> " For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court."

61. This Court has the power, pursuant to rule 33(a) of the Rules of this Court, to confirm, reverse or vary the decision of the superior court below in so far as our jurisdiction permits.

62. Importantly, we are persuaded that the circumstances surrounding the process leading to the acquisition of the title in favor of the Liberio Farm Ltd as detailed earlier fall within the circumscription of the provisions of Section 26 (1) (b) of the *Land Registration Act* 2012, hence, the learned judge erred in failing to find and hold that the process leading to the issuance of the Certificate of Lease was marred by illegalities. The next question is whether the parties having extensively submitted on the validity of the title held by the 1st, 2nd and 3rd respondents, what would be the appropriate orders to issue. Section 80 of the Land Registration

Act provides for cancellation of title where registration is unlawfully obtained. It states:

a. 1. Subject to subSection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

b. 2.The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

63. From the foregoing, we have no doubt that this Court has the power to order cancellation of the registration of the title issued to the 1st, 2nd and 3rd respondents. Consequently, we hereby allow this appeal and issue the following orders:

a. The 1st, 2nd and 3rd respondents' suit before the trial court is hereby dismissed.

b. A declaration is hereby issued that the Land Reference Eldoret Municipality Block 15/20189 measuring 2.00 Hectares was unlawfully, irregularly and fraudulently hived out and/ or excised from the 2nd respondent's land.

c. A declaration is hereby issued that the 1st, 2nd and 3rd respondents' acquisition of Eldoret Municipality Block 15/20189 measuring 2.00 Hectares is illegal, unlawful and fraudulent and the 1st, 2nd and 3rd respondents' title document is null and void.

d. An order be and is here issued cancelling the title and all entries made in the register in respect of parcel No. Eldoret Municipality Block 15/20189 measuring 2.00 Hectares in so far as the same is excised from the National Youth Service land, and, the National Youth Service is entitled to peaceful and quiet possession and use of all land forming (the) suit land.

e. A permanent injunction is hereby issued restraining the 1st, 2nd and 3rd respondents, their servants, agents and or any other person acting under it from entering, or ever laying claim or interfering with or in any other manner dealing with the suit land whose title is now cancelled.

f. Costs of the both the suit before the trial court and this appeal and interests thereon are awarded to the appellants.

**DATED AND DELIVERED AT NAKURU THIS 5TH DAY OF JUNE, 2025.**

**J. MATIVO**

**.....**

**JUDGE OF APPEAL**

**G. MWANIKI CIArb, FCIArb.**

**.....**

**JUDGE OF APPEAL**

**G.V. ODUNGA**

**.....**

**JUDGE OF APPEAL**

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

Signed.

**DEPUTY REGISTRAR.**