



**Frann Investment Limited v Kenya Anti-Corruption Commission & 6 others
(Civil Appeal E038 of 2021) [2024] KECA 714 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 714 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E038 OF 2021
P NYAMWEYA, KI LAIBUTA & GV ODUNGA, JJA
JUNE 21, 2024**

BETWEEN

FRANN INVESTMENT LIMITED APPELLANT

AND

KENYA ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

FRANCIS GITHUI WAHOME 2ND RESPONDENT

ANN GATHONI 3RD RESPONDENT

VICTOR WAHOME 4TH RESPONDENT

EDWARD KAGUME 5TH RESPONDENT

DAVID MWANGI 6TH RESPONDENT

WILSON GACANJA 7TH RESPONDENT

(An appeal against the Judgment and Decree of the Environment and Land Court at Mombasa (Munyao Sila, J.) dated and delivered on 12th November 2020 in Environment and Land Court Case Nos. 215, 216, 217, 218, 219, 220, 221, 222, 223 and 224 of 2009 (Consolidated))

JUDGMENT

1. On 12th November 2020, a judgment was delivered by the Environment and Land Court at Mombasa, (Munyao Sila J.) in Mombasa ELC Cases No. 215, 216, 217, 218, 219, 220, 221, 222, 223 and 224 of 2009 (Consolidated) in favour of the Kenya Anti-Corruption Commission (hereinafter “KACC”), the 1st Respondent herein. KACC had filed the consolidated suits against Frann Ltd, the Appellant herein, and Francis Githui Wahome, Ann Gathoni, Victor Wahome, Edward Kagume, David Mwangi and Wilson Gacanja, the 2nd to 7th Respondents herein, seeking declarations that the conversion of and renumbering of land reference number MN/III/293 to land reference number MN/III/2974 and



- creation of sub-divisions thereof , the making of a grant in respect of Land Reference Number MN/III/2974 to the 2nd Respondent, and the transfer thereof to the 2nd Respondent and the Appellant were ultra vires, irregular, fraudulent , illegal, ultra vires the 7th Respondent’s statutory power and, consequently, null and void.
2. In addition, KACC sought orders of rectification of the register and cancellation of the grant made to the 2nd Respondent in respect of land reference number MN/III/ 2974 dated 29th July 1996 and registered on 4th October 1996; and of the transfer dated 11th April 2007 and certificate of title registered on 19th April 2007 in respect of land reference number MN/III/3657. Lastly, KACC also sought orders permanently restraining the Appellant and 2nd to 7th Respondents from dealing with land reference number MN/III/3657; for discharge of the charge over the said parcel of land; that the property be restored to the Government of Kenya; and for general damages as against the 7th Respondent for fraud and breach of his fiduciary duties.
 3. Briefly, the case by KACC was that the original property, being the parcel LR No. MN/III/293-Kilifi district was illegally allocated to a Mr. Kenny Mohammed Sheikh Ali on 8th February 1995, as it was not available for alienation and belonged to the Department of Customs which had erected a customs outpost/watch tower thereon. Further, that there was no record of formal acceptance or compliance with any of the conditions on the letter of allotment. There was also no indication that Mr. Kenny Mohammed Sheikh Ali was ever registered as the owner of the original property. Additionally, that the 2nd to 7th Respondents fraudulently and illegally caused resurvey and change of Original Property L.R. No. MN/III/293 to LR No. MN/III/2974 through a process that was unprocedural and illegal, without any legal or valid basis to be carried out since only the subdivision of the original property would result in new parcel numbers in respect of the property. LR No. MN/III/2974 was subsequently subdivided into 10 plots being LR Nos. 11N/III/3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, and 3659, which were the subject of the consolidated suits. For purposes of this appeal, we shall refer to the original parcel as renumbered and sub-divided collectively as “the suit property”
 4. KACC asserted that, on 4th October 1996, the 7th Respondent made a grant in respect of the original property numbered LR No MN/III/2974, and ought to have known that he had no authority or power under section 3 of the Government Land Act} to alienate already alienated land such as the original suit property to the 2nd Respondent or at all. Further, the 7th Respondent allocated to the Appellant the suit property when he was aware that the same was already reserved for public use. Additionally, the Appellant and the 2nd to 7th Respondents should have known that the land was within a township, and that it could only be granted through a public auction as required by the [Government Land Act](#).
 5. Additionally, KACC contended that, in turn, the 2nd Respondent fraudulently and illegally caused LR No. MN/III/2974 to be subdivided into various parcels of land, including LR No MN/III/3657, which was purportedly transferred to the Appellant for valuable consideration on or about 19th April 2007 while he had no title thereto, and when there was no evidence of payment of the purchase price of Kshs 300,000/=. Furthermore, being an employee of the Customs Department and later Kenya Revenue Authority, the 2nd Respondent knew or ought to have known that the original property had been used as a customs outpost/watch tower, and was not available for alienation.
 6. It was thus the case by KACC that the Appellant was not a purchaser for value, and that the 2nd to 6th Respondents, being its directors, served as alter egos for the Appellant for the purpose of concealing the fraud involved in the alienation of the original property. Additionally, the suit property was transferred without the consent from the Commissioner of Lands and, if any consent was given, the same was



in express contravention of the terms of the grant. Further, the whole process of alienation of the original property and renumbering and grant to the 2nd Respondent was tainted by fraud and against the express provisions of law and did not and could not confer on any of the Respondents any estate, interest or right over the original/ suit property.

7. The Appellant's and the 2nd to 6th Respondents' response was that they were honest purchasers for value without notice of defect in title, which defect was denied. In addition, they argued that KACC was estopped from asserting the alleged title of the Customs Department or Kenya Revenue Authority in light of the Court's pronouncement in *Macro Insurance Brokers Limited vs. Francis Githui Wahome - Mombasa HCCC No. 254 of 2000*, where the Court found that Kenya Revenue Authority had no claim in LR No 3654/III/MN, which was an excision from LR No 2974/III/MN. That decision was not appealed from. The Appellant and the 2nd to 6th Respondents also denied that the land comprised in LR No 293/III/MN or LR No. 2974/III/MN had been reserved, planned or used as a customs outpost/ watchtower, or that the same was alienated before the issuance of the letter of offer to Mr. Kenny Mohammed Sheikh Ali. Their case was that the 2nd Respondent purchased the land comprised in LR No 293/III/MN (later 2974/III/MN) in good faith and entered into a sale agreement with Mr. Kenny Mohammed Sheikh Ali, the original allottee, and for valuable consideration without notice of any defect on title; and that the 2nd Respondent sought the requisite consents, sanctions and approval as well as paid the dues demanded by the relevant government departments to facilitate registration of his interest therein.
8. The 2nd respondent contended further that any breach of the terms and conditions of offer on the part of the original allottee or the allocating authority cannot be visited upon innocent parties, and neither could it have the invalidating effect on the grant ultimately made in his favour in light of the doctrine of waiver and acquiescence; and that the process of resurveying, renumbering and making grants in respect of the said suit property and its subsequent subdivision was done with the sanction of the Directors of Survey and the concurrence of the Commissioner of Lands, and that they could not be visited with or held responsible for any act of commission or omission or errors in the administrative process. The Appellant and the 2nd to 6th Respondents denied any fraud and sought full compensation in the event that the Appellant was ousted from any sub- division created from the original parcel by any person or entity claiming under or having better title to the land.
9. Likewise, the 7th Respondent denied the assertions in the plaint, save to admit that he was at one time a Commissioner of Lands. He stated that the powers exercised by the Commissioner of Lands were delegated by the President and thus sought leave to join the Attorney General as a party to the suit. He contended that the jurisdiction of KACC to file and prosecute the suit was taken away by dint of section 8 and 130 of the *Government Lands Act*.
10. After considering the pleadings, the submissions and hearing the witnesses, the trial Judge (Munyao Sila, J.) found that the suit property was not 'unalienated Government Land' because it was already assigned for use by the Government and, therefore, was not capable of allocation to a private individual. Accordingly, the Appellant and the 2nd Respondent could not be protected under the doctrine of innocent purchaser for value, and neither could the doctrine be used to sanitise a title that is null and void ab initio. The holding of the trial Court was that Mr. Kenny Mohammed Sheikh Ali never got a good title to the land, and thus had nothing to transfer to the 2nd Respondent and, in turn, that Respondent had nothing to transfer to the Appellant. Further, the fact that the title was subdivided changes nothing and, accordingly, the trial Judge granted the prayers sought by KACC and ordered the 7th Respondent to pay general damages in the sum of Kshs 1,000,000, and that costs be paid jointly and severally by the 1st to 7th Respondents. The 1st to 6th Respondents were also ordered to surrender vacant possession of the suit properties and remove the developments erected and being thereon within



- 30 days at their own costs and, in default, the 1st Respondent or public entity that takes over the suit property be at liberty to either maintain or remove the developments at the 1st to 6th Respondents' cost.
11. Aggrieved by the decision, the Appellant filed the instant appeal. It has raised eight (8) grounds of appeal in its Memorandum of Appeal dated 9th July 2021 and lodged on even date namely:
- a. The trial Court erred in law and fact by holding that the Appellant was not an innocent purchaser for value without notice of any of the alleged irregularities.
 - b. }The trial Court erred in law and fact by failing to find that the allegations of irregular allotment of the suit property were made by the 1st Respondent against the 1st allottee, Mr. Kenny Mohammed Sheikh Ali yet the 1st Respondent had not made him a party in the suit.
 - c. The trial Court erred in law and fact by making adverse findings against the 1st allottee, Mr. Kenny Mohamed Sheikh Ali, who was not a party to the suit.
 - d. The trial Court erred in law and fact by failing to find that the suit against the Appellant could not be sustained without the 1st allottee, Mr. Kenny Mohamed Sheikh Ali, being a party to the suit.
 - e. The trial Court erred in law and fact by failing to find that the 1st Respondent's suit could not be sustained by virtue of the judgment delivered by Mombasa HCC No 254 of 2000 - *Macro Insurance Brokers Limited vs Francis Githui Wahome*.
 - f. The trial Court erred in law and fact by failing to find that the 1st Respondent had not proved that the suit property had been alienated to the Customs Department for a public purpose, and that the said purpose still exists.
 - g. The trial Court erred in law and fact by finding that the suit property has been alienated to the Customs Department for a public purpose.
 - h. The trial Court erred in law and fact in arriving at a decision that was wholly against the weight of evidence, law and justice.
12. We heard the appeal on this Court's virtual platform on 28th November 2023. Learned counsel Mr. Gikandi appeared for the Appellant, learned counsel Mr. Ben Murei for the 1st Respondent, and learned counsel Mr. William Mogaka for the 5th and 6th Respondents. There was no appearance for the 2nd, 3rd, 4th and 7th Respondents despite service of the hearing notice on their counsel. Mr. Gikandi highlighted his written submissions dated 13th July 2023 and further submissions dated 10th November 2023. On his part, Mr. Murei reiterated his written submissions dated 28th September 2023. Mr. Mogaka aligned himself with the submissions made by Mr. Gikandi.
13. In determination of the appeal, we are mindful of the duty of this Court as a first appellate Court as set out in the decision of *Selle & Another vs. Associated Motor Boats Co. Ltd & Others* (1968) EA 123, which is to reconsider the evidence, evaluate it and draw conclusions of the fact and law. The Court would only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as held in *Jabane vs. Olenja* (1968) KLR 661; or where its discretion was exercised injudiciously as was held in *Mbogo & another vs. Shah* (1968) EA 93.
14. It is notable that even though the Appellant raised the issue of the effect of the implications of the judgment delivered by Mombasa HCC No 254 of 2000 - *Macro Insurance Brokers Limited vs Francis Githui Wahome* on the suit in the trial Court, Mr. Gikandi did not make any submissions on the issue.



- Mr. Murei pointed out that the issue was being raised for the first time on appeal and that, in any event, the finding therein did not bind KACC or Kenya Revenue Authority since they were not litigating through Macro Insurance Brokers in the said suit, and neither was their case before the said Court for determination. We therefore consider that issue as having been abandoned.
15. In addition, Mr. Gikandi raised the argument that KACC was barred by the Limitation of Action Act, and that the trial Court failed to determine this issue, which was raised in the 7th Respondent's defence. Counsel submitted that the 2nd Respondent was duly registered as the owner of the suit property and issued with a Certificate of title from 1st January 1995, and that the time the Kenya Revenue Authority would have recovered the said property started running from 2nd January 1995 and expired on 2nd January 2007. He argued that the suit was filed in 2009, way beyond the prescribed time for filing such a suit. Reliance was placed on the provisions of Order 21 Rule 4 of the *Civil Procedure Rules*, 2010 and the Court of Appeal decision in *Attorney General & another vs. Uasin Gishu Memorial Hospital Limited & another* [2021] eKLR for the proposition that the trial Court had a constitutional obligation to determine the issue of limitation. It was counsel's submission that the insulation and protections afforded to the Government by section 42(1) (d) of the *Limitation of Actions Act* ceases the minute the Government alienates the land as in the case herein, and that the said section does not apply.
 16. In reply, Mr. Murei submitted that neither the Appellant nor the 7th Respondent raised the issue of limitation at the hearing in the trial Court, and nor was it part of the Appellant's grounds of appeal. According to counsel, it was an afterthought and in abuse of the Court process. Reference was made to section 42(1) (k) of the *Limitation of Actions Act*, which excluded proceedings to recover public property from the application of the Act; and section 43, which provided for the proceedings by or against Government to which the Act did not apply. We have perused the Memorandum of Appeal dated 9th July 2021 lodged by the Appellant and indeed note that the ground of limitation of time was never raised as a ground of appeal and, therefore, cannot be the subject of this judgment. It is trite law that a party is bound by its pleadings, and is barred from introducing new issues on appeal.
 17. The remaining grounds of appeal raised by the Appellant revolve around two issues, namely the propriety of the finding that the suit properties were not available for allocation and alienation; and whether the Appellant was an innocent purchaser for value, which we now proceed to consider.
 18. On the first issue on the alienation of the suit property, Mr. Gikandi's submissions in this respect were two pronged. Firstly, he submitted that the applicable law with regards to the registration of the Appellant's interest in the suit property was the *Registration of Titles Act* (since repealed), and more particularly section 23 which vested the Appellant as registered owner with absolute ownership of the leasehold interest described in the Certificate of Lease, which title could only be impeached if the Appellant was found to have committed fraud in the process of acquiring the suit property. Learned counsel placed reliance on the holding to this effect in the case of *Dr. Joseph Arap Ng'ok vs. Justice Moiwo Ole Keiwua*, Nai Civil Application No. 60 of 1997 . Counsel submitted further that KACC had had not demonstrated any fraud or misrepresentation on the part of the Appellant or at all.
 19. Secondly , counsel submitted that it was not in dispute that the suit property was first allotted to Kenny Mohammed Sheik Ali (deceased), who then sold and transferred the suit property to the 2nd and 3rd Respondents, and that the trial Court erred in holding that the registration of the suit property was unlawful when the estate of Kenny Mohammed Sheikh Ali was not made a party to the suit property, and was therefore condemned unheard contrary to the principles of natural justice; and, lastly, that KACC did not tender any evidence to demonstrate that, at the time the property was being allocated to the late Kenny, the alleged purpose for which it had been set aside remained. According to counsel, the evidence on record showed that the custom houses were abandoned.



20. Counsel urged that the law placed a presumption of legality on actions done by public officers so as to deem the public officer as having followed due procedure unless proved otherwise. Reliance was placed on the holding by the Court of Appeal in the case of *Kibos Distillers Limited & 4 others vs. Benson Ambuto Adega & 3 others* [2020] eKLR for the principle that a court presumes that official duties have been properly discharged and all procedures duly followed until the challenger presents clear evidence to the contrary and that, therefore, this Court should proceed on the premise that the allocation to the late Kenny Mohammed Sheikh Ali was lawful and the relevant procedure followed and, unless KACC proved otherwise, the presumption should stand.
21. Mr. Murei's submissions on the indefeasibility of the Appellant's title were that the allottee was not the registered owner of the suit property and, being a mere allottee, he had not yet obtained proprietary interests and, therefore, there was nothing he could sell to the 2nd and 3rd Respondents as was held in *Dr. Joseph Arap Ng'ok vs Moiyo Ole Keuiwa and 5 others* (*supra*); and that the Appellant can only benefit from the principle of indefeasibility if he can demonstrate that his title was properly obtained. Counsel cited the decision by the Supreme Court of Kenya in *Dina Management Limited vs. County Government of Mombasa & 5 others* [2023] KESC 30 (KLR), submitting that a title created in contravention of the law is invalid, null and void and cannot confer any interest or right.
22. Learned counsel submitted further that the uncontested facts were that, on 14th September 1994, one Kenny Mohammed applied to the Commissioner of Lands to be allocated MN/III/293 on the grounds that he had done a lot for KANU and had not benefited from "the fruits of 'Uhuru'". The letter was circulated to a number of officers, among them the Acting District Commissioner, Kilifi District, who endorsed on the letter that 'there are two customs houses on the plot which are not in use'. Subsequently, on 8th February 1995, the 7th Respondent caused to be issued to the said Kenny Mohammed a letter of allotment, which was not accompanied by an approved Part Development Plan as required by law, but with a copy of a survey plan, which meant that the property was alienated without any planning contrary to statute law. In this regard, counsel made reference to the decision in *Dina Management Company Ltd vs. County Government of Mombasa and 5 others* (*supra*), submitting that a Part Development Plan must be drawn and approved by the Commissioner of Lands or Minister for Lands before any un-alienated Government Land can be allotted.
23. It was accordingly urged that the suit property was not available for alienation as there were two custom houses thereon, which was evidence that the land was planned, reserved, set aside and in actual use by the Department of Customs and Excise; that once the land was set aside for public purpose, it remained alienated and not available for alienation no matter the state of the developments on the same; and that the fact that buildings became derelict and in need of repair or reconstruction was not a ground to find that the public purpose for which it was reserved no longer exists. In addition, counsel submitted that, under section 3 of the *Government Land Act*, the power to alienate the un-alienated government land was vested in the President, and that such power was delegated to the Commissioner of Lands in limited circumstances namely: for educational, charitable, sports and other purposes as set out in the Act. It was counsel's submission that none of the exceptions set out there empowered the 7th Respondent to alienate the suit property and that, in the instant case, the land was allocated as a gift in recognition of the allottee's support of a political party, KANU. Therefore, that having demonstrated that land was set aside or reserved for a public purpose, the onus was on the party alleging the contrary.
24. With regard to the requisite fresh survey, the 1st Respondent submitted that the property allotted was already surveyed and bore the registration number MN/III/293, and that the *Survey Act* nor any other law permits an allottee to unilaterally survey an already surveyed property, as was the case in this appeal. It was their further submission that, once the property was surveyed afresh and renumbered, its character completely changed thereby necessitating a fresh process of alienation, and that the allottee could not



proceed to process title on the basis of the original allocation of MN/III/293. Furthermore, that once land was set aside for public or government purpose, the same remained unless re-planned through the process that gave rise to the reservation and, accordingly, the Government would expressly change its user applying the procedure set out in the Physical Planning Act, which entailed, inter alia, public participation as the proposed plan would have to be advertised and objections invited.

25. Lastly, on the issue as to whether KACC should have joined the estate of Kenny Mohammed (deceased), counsel submitted that the suit property did not form part of the estate of the deceased and that, as at the time of his death, he had already parted with the letter of allotment, which was his purported interest in the suit property. Accordingly, there was no need to join his estate as there was no order sought or made against the estate of the deceased. Besides, the Appellant and the 2nd to 6th Respondent were at liberty to apply to join the estate of the deceased if they thought that it was in their interest to do so.
26. The doctrine of indefeasibility of title applies with respect to the effects of registration of land, initially under section 23(1) of the repealed *Registration of Titles Act*, which provided that “the certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”. The doctrine is now recognised under section 26(1) of the *Land Registration Act*, 2012 which affirms the sanctity of title to immovable property and the indefeasibility thereof in the absence of fraud, misrepresentation or other unlawful conduct in its acquisition. This doctrine was confirmed in *Dr. Joseph Arap Ngok vs. Justice Moiwo ole Keiwua & 5 others*, Civil Appeal No.Nai.60 of 1997, where this Court categorically declared that:
- “Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”
27. In the same vein, subsequent decisions of this Court have placed limits on the application of the doctrine of indefeasibility of title. In this regard, this Court noted in the case of *Funzi Development Ltd & Others vs County Council of Kwale*, [2014] eKLR that a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. In *Arthi Highway Developers Ltd vs. West End Butchery Ltd & Others* (2015) eKLR, this Court found that fraudsters did not obtain good title to pass on to bona fide purchasers and struck down as invalid titles transferred to bona fide purchasers after having found that there was fraud in the initial transfer from the first owner. This position was confirmed by the Supreme Court of Kenya in its decision in *Dina Management Company Ltd vs. County Government of Mombasa and 5 others* (*supra*) where it held at paragraph 108 thereof that the Court could not, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land, and that it was not enough for a party to state that they have a lease or title to the property.
28. The pertinent question that we need to answer in this appeal is whether KACC discharged the burden of proving that the allocation of the land was illegal and irregular. During the hearing, KACC called



- three witnesses. The first witness, Dedan Ochieng Okwama (PW1) was its investigator, who testified that their investigations revealed that the suit land was set aside for customs department. He produced as evidence a survey plan and map which was referenced FR 22/49 and was prepared in 1922 as an exhibit, which indicated the reservation of a customs house on the suit property. He also produced a survey plan dated 8.8.1980 and the letter in response to the postal search of the suit property dated 23.9.1994 stating that there was an old customs house on the plot. Other exhibits produced by the witness included the resurvey dated 31.3.1994 when a new number was given as 2974, and the grant dated 29th July 1996 signed by the 7th Respondent in favour of the 2nd Respondent with respect to the suit property.
29. The second and third witnesses who testified on behalf of KACC were Beatrice Wambui Thuo (PW2) from the Human Resources department of the Kenya Revenue Authority (KRA) and Simon Mwaniki (PW3) from KRA's property department. PW2's evidence was that the 2nd Respondent worked with KRA from 1964 to 1997 and rose from being a preventive officer at control towers monitoring entry of goods to supervisor of the patrol bases in Mombasa; and that the 2nd Respondent had listed the 3rd Respondent as his next of kin and 4th to 6th Respondents as his children in the personnel records. On his part, PW3 testified that he visited the suit property on 17.6.2003 and observed that it was empty with some old ruins, pit latrine and a well, and undertook a search at the Mombasa lands office where he obtained a map and learnt that the numbers had been changed from 293 to 2974. KRA then put a caveat on the land in October 2005 since it wanted to re-establish it as a patrol base and build staff houses thereon.
30. The 2nd Respondent gave evidence on behalf of the Appellant and the 2nd to 6th Respondents, and confirmed that he and his family owned the Appellant company, and that he used to work for KRA. His position was that the land records did not indicate that the suit property was reserved for KRA, and neither had KRA produced any letter of allotment to it or the customs authority; and that the only letter of allotment was the one issued to Kenny Mohamed from whom he bought the land.
31. The Supreme Court of Kenya in *Kiluwa Limited & Another vs. Business Liaison Company Limited & 3 Others*, (Petition 14 of 2017) [2021] KESC 37 (KLR) explained as follows as regards unalienated government land:
- “[55] A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, unalienated government land is public land within the context of article 62 of the Constitution and the Government Lands Act (repealed). This notwithstanding the fact that, the expression “Public Land” only came to the fore with the promulgation of the 2010 Constitution. What Article 62 of the Constitution does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of “public tenure”. The retired constitution used the term “government” instead of “public” to define such lands”.
32. In this respect, section 2 of the repealed *Government Lands Act* defined “unalienated Government land” to mean Government land which was not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. Government land in this context is land that was held by government ministries, departments, statutory bodies and agencies, and land which has not been registered. Section 3 of the then Physical Planning Act defines un-alienated Government land in similar terms. A similar definition is now given to public land under Article 62 of the *Constitution*, which includes
- a. land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;



- b. land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease...
33. The Supreme Court of Kenya noted these definitions in *Torino Enterprises Ltd vs. The Attorney General*, SC Petition No. 5 (E006) of 2022; [2023] KESC 79 (KLR), and also cited with approval the decision of this Court in *Benja Properties Limited vs. Syedna Mohammed Burhannudin Sabed & 4 Others*, Civil Appeal No. 79 of 2007; [2015] eKLR that the legal effect of registration of land is to convert property from un-alienated government land to alienated land, with the consequence that the property became private property and moved out of the ambit and confines of the *Government Land Act*.
34. In this regard, KACC brought evidence in the trial Court to demonstrate that the suit property was already surveyed, planned, and reserved for use as a customs house at the time of its allocation to Mr. Kenny Mohammed Sheikh Ali. One of the issues raised in *Dina Management Limited vs. County Government of Mombasa & 5 others* (supra) was whether land that had been reserved for a road could be allocated. The Supreme Court found the then applicable law and its effect to be as follows:
- “(51) From the record and submissions, we note that the land was first allocated to HE Daniel T Arap Moi in 1989. The applicable law at the time was the Land Planning Act, cap 303, which was repealed by the Physical Planning Act cap 286 which has since been repealed by the Physical and Land Use Planning Act No 13 of 2019. The Land Planning Act made provision for open spaces. regulation 11(3) of the Development and Use of Land (Planning) regulations, 1961 made under the Land Planning Act defined “public purpose” as any non-profit making purpose declared by the Minister to be a public purpose and includes educational, medical and religious purposes, public open spaces and car parks; and Government and local government purposes. Similarly, under the Physical Planning Act, section 29 gave the local authorities power to reserve and maintain land planned for open spaces.
- (52) The suit property was at the time designated as an open space. Having been designated as such, it was rendered a public utility and could not be described as unalienated public land as urged by the appellant. It was therefore not available for alienation to HE Daniel T Arap Moi or for further alienation...”
35. We are bound by this decision and have no hesitation in finding that, having been planned and reserved for use by the customs department, and this being a public purpose, the suit property was not unalienated land and was therefore not available for alienation.
36. We also find that, even if the suit property was thereafter available for allocation as unalienated Government land as urged by the Appellant, there was a specific and mandatory procedure required to be followed under section 9 of the repealed *Government Land Act*, which required the Commissioner of Lands “to cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner”. This procedure was explained in detail



by the Supreme Court in *Dina Management Limited vs. County Government of Mombasa & 5 others* [supra] as follows:

“104. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR as follows:

‘... It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un- alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co Ltd v Attorney General*, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: ‘Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot

131. 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.”

37. It is notable that this procedure was required to be followed before the allocation of the suit property to Mr. Kenny Mohammed Sheikh Ali. In addition, section 10 of the *Government Land Act* required leases with respect to town plots may be granted for any term not exceeding one hundred years, and section 12 specifically required the said leases, unless the President otherwise ordered in any particular cases, to be sold by auction. No evidence of such procedure was adduced by the Appellant, who was the one alleging that the suit property was available for alienation and therefore bore the burden of proving that this was the fact. No evidence was also brought of any lease issued to Mr. Kenny Mohammed Sheikh Ali that was capable of being transferred to the 2nd Respondent and thereafter to the Appellant. It is settled law in this respect that the transfer of an allotment does not transfer any registrable interest in land as explained by the Supreme Court in *Torino Enterprises Ltd vs. The Attorney General* (supra) thus:

“58. So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In *Dr Joseph NK Arap Ng’ok v Justice Moiyo Ole Keiyua & 4 others* CA 60/1997 [unreported]; and in *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* HC Civil Case



No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:

‘It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all.’ [Emphasis added].

59. The pronouncement in *Gladys Wanjiru and Dr. Joseph NK Arap Ng’ok* (supra) has been echoed in various Environment and Land Court decisions post the 2010 Constitution, including; *Lilian Wanjeri Njatha v Sabina Wanjiru Kuguru & another*, Environment and Land Case No 471 of 2010; [2022] eKLR; *John Elias Kirimi v Martin Maina Nderitu & 4 others*, Environment and Land Suit No 320 of 2011; [2021] eKLR; and *Kadzoyo Chombo Mwero v Ahmed Muhammed Osman & 11 others*, Environment and Land Case No 42 of 2021; [2021] eKLR, to mention but a few.
60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are 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 fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter”
38. Lastly, and while still on the arguments raised on the indefeasibility of the Appellant’s title, it is our view that joinder of Mr. Kenny Mohammed Sheikh Ali was not necessary for the adjudication of the issues before the trial Court. The question of when joinder of a party is necessary was enunciated in *Deported Asians Property Custodian Board vs. Jaffer Brothers Ltd* [1999] 1 EA 55 thus:
- “A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”
39. The alleged allocation of the suit property to Mr. Kenny Mohammed Sheikh Ali was in this respect not in issue, and KACC produced evidence of the allocation. It was also not contested that Mr. Kenny Mohammed Sheikh Ali purported to sell the suit property to the 2nd Respondent, who was subsequently registered as the owner. To our mind, there were no issues that required clarification by



participation of Mr. Kenny Mohammed Sheikh Ali or his estate, nor were their interests affected to necessitate their joinder.

40. On the second issue as to whether the Appellant was an innocent purchaser for value, Mr. Gikandi submitted that the Appellant held a title deed and was in actual possession of the suit property upon successful purchase, transfer and registration. Further, that the Appellant had no knowledge of any fraud and that, at the time of the purchase and transfer of the suit property, it was registered in the name of the 2nd and 3rd Respondent as the absolute owners and, upon conducting an official search and due diligence, there never existed any caveat, caution, restriction nor were there any other interests registered, shown or anticipated from any third party; and lastly, that the Appellant paid the requisite purchase price, and the property was legally and rightfully transferred to it upon execution of all requisite documents. Reliance was placed on the decisions of this Court in *Bruce Joseph Bockle vs. Coquero Limited* [2014] eKLR; and *Joseph Arap Ng'ok vs Justice Mojjo Ole Keiuwa & 4 others* [1997] eKLR for the submissions that KACC did not demonstrate any fraud in the part of the Appellant.
41. On his part, Mr. Murei submitted that the 2nd Respondent was employed by the East African Customs & Excise Department as a preventative officer on 26th March 1964, and must have known that MN// III/293 comprised a Custom House and a watch tower and that, together with the 3rd Respondent, who was his wife, purchased the purported interest in the letter of allotment and participated in the acquisition of the property. Reference was made to the decision in the case of *Chauban vs. Omagwa* (1985) KLR 656 for the submission that knowledge on the part of the 2nd Respondent was imputed to the Appellant, which must be deemed to have had the background knowledge of the land, and cannot be said to be innocent. It was asserted that the 2nd and 3rd Respondents formed the Appellant, with their children, the 4th to 6th Respondents, with a view of taking advantage of the plea of innocent purchaser for value without notice.
42. We are again guided by the decision by the Supreme Court in *Dina Management Limited vs. County Government of Mombasa & 5 others* (supra) wherein the doctrine of an innocent purchaser for value and decisions on its application were enunciated as follows:
 - “ 90. The Black’s Law Dictionary 9th 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.”
 91. The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a bona fide purchaser for value as follows: “For the purposes of this appeal, it suffices to describe 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. For a purchaser to successfully rely on the bona fide doctrine he must prove that: 1. he holds a certificate of title; 2. he purchased the property in good faith; 3. he had 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; and 7. he was not party to the fraud.”
 92. On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar*, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR stated as follows: “...in order to be considered a bona fide purchaser for value, they must prove; that they



acquired a valid and legal title, secondly, 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”

43. The Supreme Court proceeded to hold that establishing a good root of the title is the first step in establishing whether a party is a bona fide purchaser for value as the title or lease is an end product of a process. We have already found in this regard that the title held by the Appellant is not indefeasible as the process that was followed prior to its issuance did not comply with the law, and that, therefore, the Appellant cannot claim to be a purchaser for value. In addition, the following observations made by the Supreme Court in *Torino Enterprises Ltd vs The Attorney General* (*supra*) are pertinent in this appeal:

“[64] An innocent purchaser for value would also denote one was aware of what they are purchasing by inspecting the suit premises. This takes us to the question of whether the appellant had visited the suit premises and if so, what was its impression of the military installations on the suit premises? The fact that the suit land was occupied must have sounded a warning of “buyer be aware” to the appellant. We therefore find that it was not an innocent purchaser for value entitled to orders for restoration or compensation...”

44. The Appellant is, by the 2nd Respondent’s evidence given on its behalf, owned by the 2nd Respondent and his family, and did not dispute the evidence that the 2nd Respondent was an employee of the East African Customs & Excise Department and later KRA. This Court would be aiding and abetting an irregularity and illegality if we turn a blind eye to the fact that the 2nd Respondent was aware that the suit property was a customs house at the time of the purported purchase of the property, as he was a supervisor thereof. We therefore find that the transfer of the suit property to the Appellant was not made in good faith, as it was meant to obfuscate the fraudulent and illegal acquisition of the property by the 2nd and 3rd Respondents. All in all, we find that the trial Court did not err in its findings.

45. It is thus our conclusion that this appeal has no merit, and we hereby dismiss it in its entirety with no order as to costs, given the nature of its public interest. Consequently, we hereby affirm the orders given by the trial Court in the judgment delivered on 12th November 2020 in Mombasa ELC Cases No. 215, 216, 217, 218, 219, 220, 221, 222, 223 and 224 of 2009 (Consolidated).

46. Orders accordingly.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024

P NYAMWEYA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify this to be a true copy of the original



Singed

DEPUTY REGISTRAR

