Kenya Ports Authority v Africa Inland Church - Kenya (Registered Trustees) & 12 others (Civil Appeal 198 of 2018) [2024] KECA 1431 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1431 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 198 OF 2018

HM OKWENGU, KI LAIBUTA & JM MATIVO, JJA

OCTOBER 11, 2024

BETWEEN

KENYA PORTS AUTHORITY .... APPELLANT

AND

AFRICA INLAND CHURCH - KENYA (REGISTERED TRUSTEES) .... 1ST RESPONDENT

CATHERINE NDUKU & 11 OTHERS & 11 OTHERS .... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (L. Gacheru, J.) delivered on 4th August, 2017 in Civil Case No. 222 of 2010 (OS)))

JUDGMENT

1. On 4th August 2017, the Environment and Land Court (ELC) (Gacheru, J), delivered a judgment in favour of African Inland Church-Kenya (Registered Trustees) (herein AIC) - the 1st respondent in this appeal. The judgment required the appellant, Kenya Airports Authority (Airports Authority), Catherine Nduku &11 others (the 2nd to 12th respondents), to give AIC vacant possession of a property known as LR. No. 209/11924.

2. The judgment was the culmination of proceedings in an amended originating summons dated 18th March 2011 that had been filed by (viii) Costs of the suit.

3. The motion was anchored on the grounds stated on the face of the motion, and an affidavit sworn by Reverend Peter Ngule (Rev. Ngule), who was at the material time in charge of the AIC Langata District Church Council. In brief, AIC, who claim to be the absolute owner of Land Parcel No. LR. 209/11924, was aggrieved that the Airports Authority and the 2nd to 12th respondents had illegally occupied the property and erected temporary mabati business structures on the land parcel. It therefore sought to have the Airports Authority and 2nd to 12th respondents evicted from the land parcel; a

permanent injunction issued restraining them from occupying the land; mesne profits for the period that they had been in illegal occupation; and damages for loss of user.

4. The Airports Authority, and the 2nd to 12th respondents all opposed AIC's amended originating summons. The Airports Authority relied on a replying affidavit sworn by one Joy Nyaga (Joy), its acting Corporation Secretary. Joy deposed that LR. No. 209/11924 was part of land which had been declared aerodrome land in 1962; that the aerodrome land, then known as Wilson Aerodrome, was gazetted as an airport and became known as Wilson Airport; that Wilson Airport was placed under the Airports Authority through the *Kenya Airports Authority Act*, Cap 395; that, through powers contained in that legislation and subsequent vesting orders, all the assets that were under the control of Aerodrome's Department, including Wilson Airport, were transferred to Airports Authority; and that, subsequently, the Airports Authority was issued with a certificate of title LR. No 209/13080, which included land parcel formerly known as LR. No. 209/11924. Joy maintained that the Airports Authority had not excised any part of that land parcel for alienation to any third party, including AIC; and that title LR. No. 209/11924 issued to AIC was a nullity, as the Commissioner of Lands did not have power to alienate the property designated as aerodrome/airport land, to AIC.

5. In response to the replying affidavit sworn by Joy Nyagah, Rev. Ngule filed a further affidavit in which he reiterated that AIC was the first registered owner of LR. No. 209/11924, having been registered on 1st July 1990. Rev. Ngule also swore that LR. No. 209/11924 and LR. No. 209/13080 referred to two different land parcels; and that AIC was the registered owner of LR. No. 209/11924, and that its title was absolute and indefeasible.

6. During the hearing of the amended originating summons, AIC adopted the affidavits sworn by Rev. Ngule and also testified through Reverend Stanley Mulinge Mutangili (Rev. Mutangili). The witness was at the material time the property officer dealing with the District Church Council for AIC. He testified that land parcel LR No. 209/11924 was allocated to AIC in 1990. He produced in evidence a title deed for the property. He also referred to a letter of allotment, but, none was produced in evidence. He produced a letter from the Ministry of Lands confirming that the land parcel belongs to AIC.

7. Rev Mutangili testified that AIC intended to put up a building on the property, and that its plans had been approved by the City Council. Consequently, it served appropriate notices on the 2nd to 12th respondents, whom it had allowed to temporarily occupy the land parcel, but that the Airports Authority claimed ownership of the land. Under cross examination Rev. Mutangili reiterated that the 2nd to 12th respondents occupied the premises as tenants of AIC. He conceded that he was only an employee, and was neither a trustee nor an official of AIC. He also admitted that he did not know how the land was acquired.

8. The Airports Authority adopted the affidavit sworn by Joy and called two witnesses. The first witness was Margaret Munene (Margaret), who had at that time replaced Joy as legal counsel of the Corporation. The second witness was Rashid Abdulrahi (Rashid), a land surveyor in the Airports Authority.

9. Margaret, who adopted her witness statement, testified that LR. No. 209/11924 was part of land within Wilson Airport reserved for public use; that it was not available for allocation; and that the Airports Authority did not give consent for the allocation of the land parcel to AIC. Under cross examination Margaret stated that the Airports Authority was issued with a title in 1996 and a vesting order in 1994. She pointed out that the original acreage of the aerodrome property was 265.5 acres, although the title issued to Airports Authority indicated the acreage as 163.67 Hectares. She testified that the Airports Authority did not receive any rents from the 2nd to 12th respondents, as those respondents were also trespassers on the land.

10. Rashid referred to a structural plan for Nairobi South and identified plot No. 4959 as the original plot that had been reserved for development of the aerodrome. He stated that the land which was 265.5 acres also formed the outer boundary of the Wilson Airport as indicated on title LR. No. 209/13080 issued to the Airport Authority, whose acreage was indicated as 163.67 hectares. He asserted that the land claimed by AIC was within the Wilson Airport land. He explained that some sub leases were given to tenants who did business within the Airport but that, sometime in the mid 1990's, some illegal allocations were made to private developers.

11. Rashid referred to a parliamentary report that reflected illegal allocations of aerodrome/airport land. This included Mitumba village within the Wilson Airport land, which was demolished, and two parcels of land illegally created and allocated, but the allocation was subsequently nullified as the land was within the Airport land. The witness stated that the title LR No. 209/11924 is located within the road reserve for the aerodrome; that the land was for public use and could not be allocated to a private developer, unless a process that involved de-gazettement of the land was followed; and that, in this case, there was no such de-gazettement. The witness maintained that the land claimed by AIC was, according to the masterplan of Wilson Airport which is one of the busiest Airport in East Africa, required for expansion of the Airport.

12. Under cross-examination, Rashid, who claimed to have worked in the survey department from 1991 before moving to Airports Authority in 2004, explained that the procedure for allocation of land, was that an application had to be made to the Commissioner of Lands after which balloting was to be done. In this case, although there was a deed plan issued, the procedure for allocation was not followed as the land was not available for allocation, having been reserved for Wilson Airport. He explained that what was reflected on the title as reserved for the Airport was 163.67 Hectares, the original 107 Hectares that had been reserved having been increased. He conceded that AIC's title was genuine as there was a letter from the Commissioner of Lands, but maintained that the allocation was not valid as the Airports Authority was not made a party to the allocation of the land to AIC.

13. The 12th to 13th respondents did not call any witnesses, nor did they file any written submissions.

14. The trial Judge, upon considering the affidavit evidence, the oral evidence adduced by the witnesses, the contending written submissions filed by the respective parties, the law and the cited authorities, made findings as follows: that LR. No. 209/11924 was registered in the name of AIC on 1st July 1990 and the deed plan for the property issued on 8th June 1993; that LR. No. 209/13080 was registered in favour of the Airports Authority and a certificate of title issued on 1st August 1996; that LR. No. 209/13080 is approximately 163.67 hectares while LR. No. 209/11924 is approximately 0.3399 hectares; and that no evidence was availed to the court to link the two parcels.

15. In addition, the learned Judge found that AIC had leased out LR. No. 209/11924 to the 2nd to 12th respondents to carry out various businesses, but that it had issued those respondents with notices to vacate LR. No. 209/11924 through a letter dated 16th September 2005. The 2nd to 12th respondents did not move out of the premises despite a reminder dated 29th March 2010, asking them to vacate. The trial Judge concluded that there was no evidence of double allocations; that LR. No. 209/11924 was properly allocated to AIC and the title properly issued to it; and that the title LR. No. 209/11924 was indefeasible, as it had never been cancelled or revoked. The trial Judge therefore ruled that AIC was entitled to the orders sought.

16. In its memorandum of appeal, the Airports Authority has raised 6 grounds, faulting the trial Judge: for holding that AIC legally acquired LR. No. 209/11924 for private use, despite also finding that the same property was part of land that was declared to be aerodrome land and set aside for use as an

aerodrome; in holding that the Commissioner of Lands had rightly allocated LR. No.209/11924 to AIC, notwithstanding the provisions of Section 3(a) of the Government Lands Act Cap 280 (now repealed); in finding that the Commissioner of Lands had rightly allocated LR. No. 209/11924 to AIC, despite the fact that it was disputed that LR. No. 209/11924 had been declared to be an aerodrome and set aside for public use, and was therefore not available for alienation; in failing to find that AIC's title was fraudulently acquired, despite the fact that AIC did not prove the existence of any de-gazettment of LR. No. 209/11924 from the aerodrome land; in failing to take into account the provisions of Section 33 and 34 of the *Kenya Airports Authority Act*, which require any claim by a party (in this case AIC) against the Airports Authority in respect of its land to be canvassed as provided by the mandatory provisions of section 33 and 34 of the Kenya Airports Authority; and in misinterpreting and misconstruing the Airports Authority's submissions, misdirecting herself on the law, and in refusing to follow the decisions cited by the Airports Authority.

17. The Airports Authority filed written submissions in which it compressed the issues for determination into three, namely:

    i. Whether the ELC erred in holding that no evidence was produced to support the Airport Authority's assertion that LR. No. 209/11924 was curved out of land survey plan No. 27245 dated 26th October 1928 demarcated for use as Wilson Airport.

    ii. Whether the learned Judge of the ELC erred in failing to hold that once land has been set aside for public use, it is not available for alienation by the Commissioner of Lands for private use by virtue of section 3(a) of the Government Lands Act Cap 280 (now repealed).

    iii. Whether the learned Judge of the ELC erred in failing to find that AIC's title was illegally and unprocedurally acquired, hence the same ought to be cancelled.

18. On the first issue, the Airports Authority pointed out evidence adduced during the trial that, in its view, proved that LR. No. 209/11924 was part and parcel of the larger parcel surveyed and reserved for public use as Airport land. The evidence included: the Aerodromes (Control of Obstructions) Act, Cap 396 Laws of Kenya 1962, which set aside an area of land, approximately 265.5 hectares situated adjoining the southern boundary of Nairobi Municipality to be utilized as Wilson Aerodrome indicated on boundary plan No. 450 deposited in the Survey Record office, Survey of Kenya in Nairobi. Survey plan number 27245 dated 26th October 1928, where land measuring 265.5 hectares was delineated and edged red on the boundary plan; a vesting order providing that all government property previously administered by the department of Aerodromes, which constructed Wilson Aerodrome, be transferred to the appellant; and Section 4 of the *Kenya Airports Authority Act*, which allowed the vesting on the appellant of property belonging to the government that was useful to the appellant for the performance of its functions.

19. The Airports Authority faulted the learned Judge for failing to consider caselaw, in particular, Caroline Awinja Ochieng vs Jane Gitau & 2 Others [2015] eKLR where it was held that tracing ownership of unregistered land is dependent on tracing the root of the title, as the title deed must establish an unbroken chain that leads to a good root of title.

20. On the issue as to whether LR. No. 209/11924 had been set aside for public use and was not available for alienation by the Commissioner of Lands, the Airports Authority relied on section 3(a) of the Government Lands Act (now Repealed), contending that the suit property was un-alienated government land, which had been set aside as aerodrome land. Thus, it was not available for allocation for private use, and that survey plan 27245 showed that the land was set aside as an aerodrome reserve area.

21. The Airports Authority cited a High Court decision in Paul Nderitu Ndungu & 20 others vs Pashito Holdings Limited & Anor, Nairobi HCCC No. 3063 of 1996 where it was held that it was not open to the Commissioner of Lands to alienate land which had been reserved for public purpose. It faulted the learned Judge for holding that AIC held a genuine title, when the land from which the title is derived had been set aside for public use as airport land. The Airports Authority argued that the mere holding of title is not conclusive evidence of ownership if the root of such title was in dispute.

22. On the question as to whether AIC's title failed the indefeasibility test, and whether the title was illegally and un- procedurally acquired, the Airports Authority submitted that AIC failed to prove that there was degazettement of LR. No. 209/11924 from land which was reserved for public use, and that its title cannot be indefeasible, as it was acquired un-procedurally and contrary to public interest. The Airports Authority cited Republic vs Minister for Transport and Communication & 5 others ex-parte Waa Ship Garbage Collector & 15 Others, [2006] KLR (E&L) 1 563; and Dina Management Limited vs County Government of Mombasa & 5 Others [2021] eKLR, for the proposition that alienation of land that defeats public interest goes against the letter and spirit of *the Constitution*; and that where property is acquired through a procedure against the law, the title is not indefeasible. The Airports Authority therefore urged the Court to allow the appeal and cancel AIC's title in LR. No. 209/11924, and allow the land to revert to the Airports Authority as Wilson Airport land.

23. AIC opposed the appeal through written submissions dated 16th January 2023 that were duly filed and highlighted by its counsel. AIC maintained that it was the bona fide registered and absolute owner of LR. No. 209/11924, and that it was issued with a valid title on 1st July 1990, which title has not been expunged. AIC stated that it was in partial possession of LR. No. 209/11924 and was desirous of developing it, and that it had already assigned contractors, who were scheduled to move on site; and that it had served notices on the 2nd to 12th respondents and the Airports Authority, requiring them to vacate the premises, but that the Airports Authority, the 2nd to 12th respondents had failed and/or refused to vacate the suit premises.

24. AIC urged the Court to uphold the judgment of the trial court, maintaining that the learned Judge properly apprehended and applied the law on the effect of section 26 of the *Land Registration Act*, which replaced Section 23 of the Registration of Titles Act on the indefeasibility of title. AIC maintained that it was the absolute owner of LR. No. 209/11924 as evidenced by a copy of the title deed that it had produced in evidence.

25. AIC urged the Court to apply section 26 of the *Land Registration Act*, which is the law governing ownership of land. It pointed out that the vesting order issued in favour of the Airports Authority via legal notice No. 102 of 7th June 1994 does not refer to LR. No. 209/11924. Moreover, it was issued long after the title of AIC, which was registered on 1st July 1990. It was maintained that AIC's title was first in time and the maxim of equity "when two equities are equal, the first in time shall prevail," applies, and that AIC's title is indefeasible.

26. AIC asserted that its allocation and registration of LR. No.209/11924 was regular and without any evidence of fraud, and neither was any fraud proved or tendered by Airports Authority, and that it was therefore entitled to protection of its property as provided by Article 40 of *the Constitution*. In support of its submissions, AIC cited Charles Karathe Kiarie & 2 Others vs Administrators of the Estate of John Wallace Mathare (deceased) & 5 others [2013] eKLR where this Court held that a title, in the absence of fraud, is absolute and indefeasible, and that fraud is a matter of fact which must be proved by way of evidence. AIC argued that the burden of proof was upon the Airports Authority to prove any fraud which burden the Airports Authority had failed to discharge. AIC therefore urged the Court to dismiss the appeal as it had no merit.

27. We have carefully considered the appeal, the rival submissions, the law and the authorities cited. This being a first appeal, we have a responsibility to reconsider and re-evaluate the evidence which was before the trial court in order to come to our own conclusion. In doing so, we are mindful of the fact that the trial court had the advantage of seeing the witnesses and assessing their demeanour and, therefore, unless there is clear evidence that the learned Judge misapprehended the law or facts, we should not differ with the findings of the trial court on facts. ((see Selle & another –vs- Associated Motor Boat Co. Ltd & others (1968) EA 123); and Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212).

28. The dispute in this appeal is basically between the Airports Authority and AIC over land. The two have each produced a certificate of title in its name. That is, LR. No. 209/11924 in the name of AIC and LR. No. 209/13080 in the name of the Airports Authority. But this is not a simple case of the usual double allocation involving the same plot. The two titles produced have an acreage of 0.3399 hectares and 163.67 hectares respectively. According to the Airports Authority, LR. No. 209/11924 was curved out of land which, on Plan Survey No. 27245, was demarcated for use as Wilson Airport, and is therefore subsumed in LR. No. 209/13080, which is the title that was issued to the Airports Authority for Wilson Airport. The Airports Authority's argument is that AIC's title was irregularly and illegally issued because LR. No. 209/13080 belongs to the Airports Authority, the land having been reserved as aerodrome land as early as 1962, which means, that the land allocated to AIC was not available for alienation and allotment.

29. For AIC, it is maintained that the two land parcels are completely separate, LR. No. 209/11924, having been allocated to it and title issued to it in 1990 well before title for LR No. 209/13080 was issued to the Airports Authority in 1996, and that there is no evidence that LR No. 209/11924 was curved out of LR No. 209/13080.

30. The issues that we discern for our determination are, first, whether the two titles issued to AIC and Airports Authority are for two completely separate land parcels, or whether LR No. 209/11924 was curved out of LR. No. 209/13080; secondly, whether LR. No. 209/11924 was properly and procedurally allocated to AIC, and whether AIC's title is absolute and indefeasible; and, finally, whether the learned Judge properly considered and evaluated the evidence and, if so, whether AIC was entitled to the orders sought.

31. It is not disputed that AIC has a title showing that a grant was issued to it for LR. No. 209/11924. According to the copy of the title which was produced in evidence, the grant was signed by the Registrar of Titles on 2nd August 1996, and is for a 99-year lease effective from 1st July 1990. AIC's evidence was that the land was allotted to it in 1990. However, the letter of allotment was not produced in evidence. The finding of the learned Judge that LR. No. 209/11924 was registered in the name of AIC on 1st July 1990 and the deed plan for the property issued on the 8th June 1993 was not supported by any evidence.

32. As for the Airport Authority, it produced a copy of a title for LR. No. 209/13080 which shows that the grant was issued to it on 18th September 1996 and that it was for a 99-year lease effective from 1st August 1996. The Airports Authority traces its interest in LR. No. 209/13080 to land reserved for Wilson Aerodrome/Airport in 1962. The question is whether, as contended by the Airports Authority, the land subject of the title issued to AIC and the Airports Authority was land which had been reserved as aerodrome land.

33. In the Aerodrome's (Control of Obstruction) Ordinance (Chapter 396), which was revised in 1962, an area of approximately 265.5 acres, which was delineated and edged red on boundary plan No. 450 deposited in the survey record's office of survey of Kenya, was declared to be aerodrome land through

a subsidiary legislation under Section 2 of that Ordinance. The Airports Authority maintained that, by virtue of that subsidiary legislation, coupled with a Vesting Order dated 7th June 1994, duly signed by the Minister of State vesting all government properties previously administered by the department of aerodromes on the Kenya Airports Authority, the land was vested on the Airports Authority. This was the land subject of the title LR. No. 209/13080, which was issued to the Airports Authority on 18th September 1996, giving it a 99-year lease effective from 1st August 1996.

34. In her affidavit, Joy explained that Wilson aerodrome was gazetted as an airport and all assets of Wilson aerodrome became vested in Wilson Airport. She produced a copy of a plan demarcating the area which had earlier been declared aerodrome land as the area for Wilson Airport. She also referred to the Airports Authority Act Cap 395 No. 3 of 1991 under which the Airports Authority was established and which gave the authority the power to take over the functions and operations of the departments of aerodromes.

35. The existence of the legislation referred to by Joy is common knowledge as it is part of the laws of Kenya. Under section 4 of the Kenya Airport's Authority Act, the Minister responsible for aerodromes had the authority to vest on Airports' Authority any property necessary or useful to the Airports Authority for the performance of its functions. It would appear that, although this Act commenced on 31st May 1991, the vesting was not done until 7th June 1994 when an order was signed by the Minister vesting all government properties previously administered by the department of Aerodromes on the Airports Authority.

36. The question is, between 31st May 1991 when the Airports Authority was established and 7th June 1994 when a Vesting Order was made in favour of the Airports Authority, what was the position of the 265.5-acre land that had been previously reserved for the Aerodrome's department in general, and Wilson Aerodrome/Airport in particular? Was the land available for allocation? This question is important because the allocation of the land subject of LR. No. 209/11924 is said to have been done in 1990, and a title, though issued on 2nd August 1996, is for a 99-year lease effective from 1st July 1990.

37. What emerges is that as at 1990 when the land subject of LR. No. 209/11924 is purported to have been allotted to AIC, the land was already part of land committed to the Aerodromes Department for Wilson Aerodrome/Airport which is a public utility. It remained public land, and this fact did not change at any time as the Wilson Airport remained functional under the Aerodrome Department until 1991 and, thereafter, under the Airports Authority when it took over under the *Kenya Airports Authority Act*. The reservation of the land as Aerodrome's land by virtue of the Aerodrome's (Control of Obstruction) Act remained in force as the Act has never been repealed. That is to say that the land subject of LR. No. 209/11924 was not unalienated land that could be allotted to AIC under section 3A of the Government Lands Act.

38. In her judgment, the learned Judge commenced her analysis as follows:

> Before embarking on the issues for determination, the Court will point out a few issues that are not in dispute. There is no doubt that LR. No.209/11924, is registered in the name of African Inland Church Mission (Kenya) Registered Trustees, who were registered as such on 1st July 1990. The Deed Plan No.113952, for this parcel of land was issued on 8th June 1993. There is no doubt that LR.No.209/13080, is registered in favour of Kenya Airport Authority, and the said Certificate of Title was issue d on 1st August 1996. That was six years after LR.No.209/11924, had been issued to the Plaintiff herein. It is evident that LR.No.209/13080, is approximately 163.67 Hectares and LR.No.20911924, is approximately 0.3399 Hectares. Therefore, the two parcels of land have different registration number and different acreage. It is also not evident whether LR.No.209/11924,

is part of LR.No.209/13080 or whether it was excised from the land parcel that forms LR.No.209/13080. The Court makes that finding because no evidence was availed to link the two parcels of land.

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There is also no doubt that vide a letter dated 18th November 2011, from the Ministry of Lands and signed by the Chief Land Registrar, the said Ministry confirmed that LR.No.209/11924, was a genuine title and it was registered in favour of the Plaintiff herein. Further vide an Official Search carried on 24th June 2011, the suit property was confirmed to be still registered in the name of the Plaintiff herein. There is no evidence that the said title has been cancelled or revoked. If that is the case, then on the face of it, the Plaintiff is the indefeasible and absolute proprietor of the suit land as provided by Section 26(1) of the *Land Registration Act* of 2012.

39. With all due respect, the learned Judge misdirected herself.

While it was not disputed that AIC was the titleholder for LR. No. 209/11924, there was an issue as to whether this title was legally, procedurally and regularly acquired in light of the Airport Authority's contention that the land subject of LR. No. 209/11924 was not available for allocation. This is in accordance with section 26 of the *Land Registration Act*, which AIC relied on to support the indefeasibility of its title. That section states as follows:

"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." (emphasis provided)

40. Once an issue arises regarding the procedural propriety of the acquisition of a title, the presumption of indefeasibility of the title is open to scrutiny. This was the position in Embakasi Properties Limited & Anor. v Commissioner of Lands & Anor [2019] eKLR where a 5 Judge Bench of this Court rendered itself on the same issue as follows:

"Although it has been held time without end that the certificate of title is; "...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof", it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the *Land Registration Act*, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances,

easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired "illegally, unprocedurally or through a corrupt scheme". (emphasis added)

41. The fact that AIC had a title for LR. No. 209/11924 only provided prima facie evidence of its ownership and, since this title was disputed, it was incumbent on AIC to prove its ownership, including tracing the root of that title. The learned Judge, in the judgment, addressed the specific question as to whether property LR. No.209/11924 was available for allocation to AIC as follows:

> " The Plaintiff through its witness Stanley Mulinge Murangiri (Sic) testified that the church (Plaintiff) was allocated the suit land in the year 1990, and a title deed was issued on 1st July 1990. He testified that the suit land was allocated to the Plaintiff procedurally. However, the 13th Defendant testified that the suit land was not available for allocation because the said land belonged to the 13th Defendant. Therefore, it was its evidence that the Commissioner of Lands had no power to allocate the 13th Defendant's land to anyone. It is evident that the 13th Defendant acquired title to its land LR.No.209/13080, in the year 1996. That was 6 years after the Plaintiff had acquired title for its parcel of land LR.No.209/11924, on 1st July 1990. There was evidence from the Ministry of Lands specifically the letter signed by the Chief Land Registrar, which confirmed that the Plaintiff/Applicant's title to LR, No.209/11924, was authentic and the certificate of title was genuine. The said letter is dated 18th November 2011. However, there was no evidence called by the 13th Defendant from the relevant Ministry to confirm that indeed LR.No.209/11924, was curved from the land that belonged to the 13th Defendant and that by the time the said allocation was done to the Plaintiff, this land had already been allocated to 13th Defendant. There is no dispute that the 13th Defendant acquired all the assets that belonged to Aerodrome Department. However, no evidence was adduced to confirm and prove that this suit land was part of the Aerodrome land. The Parliamentary Report relied by the 13th Defendant also has no reference to the suit property herein. The Court finds and holds that by the time the suit land was allocated to the Plaintiff/Applicant, there was no evidence that it was a public land belonging to the 13th Defendant. The Court therefore comes to a conclusion that the suit property herein LR.No.209/11924, was available for allocation to the Plaintiff/Applicant and the Plaintiff was rightly allotted the suit property and it went ahead and obtained the title on 1st July 1990."

42. We have three main concerns arising from the above extract of the judgment. First, the learned Judge did not address the evidence adduced by the Airports Authority regarding the contention that the land within Wilson Aerodrome/Airport was reserved as Aerodrome land, and that the reserved land covered the area indicated on Land Survey Plan No. 205579, which included the area covered by LR. No.209/11924. Joy in her affidavit, Margaret and Rashid in their oral evidence, which we have already adverted to, all testified that the 265.5-acre land was reserved for Wilson Aerodrome/Airport, and an appropriate survey map was produced. The map shows that LR. No. 209/11924 was within the area of Wilson Airport. On the other hand, although Rev. Mutangili made reference to the Deed Plan, the same was not produced. Neither did AIC call a witness from Hekima Land Surveyor who is said to have surveyed the land. The allegation that the title deed was issued on 1st July 1990 is also not correct as AIC produced a title which was signed by the Registrar of Titles on 2nd August 1996, and the title could not therefore have been issued earlier.

43. Secondly, the focus of the learned Judge appears to have been on the question of double allocation, hence her consideration of which title was issued first as between AIC and the Airport's Authority.

This led the Judge to capitalize on the fact that the two titles issued to AIC and the Airports Authority had different acreages, and that they also bore different registration numbers. However, that fact did not rule out the possibility of the land subject of AIC's title, which was a much smaller piece of land, having been subsumed in the land reserved for Wilson Aerodrome/Airport, which was, as claimed by the Airport's Authority, subject of the Airports Authority's title.

44. Thirdly, the learned Judge appears to have missed the mark.

The issue was not whether the title issued to AIC was genuine, but how the title was acquired and whether the title was issued regularly and legally in terms of procedural propriety.

45. In Dina Management Limited vs Mombasa County Government & 5 others [2023] KESC 30 KLR, the Supreme Court stated 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 allotees. 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...'
>
> 108. As we have established above, before allocation of 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.......'
>
> ....

110. Indeed the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible."

46. We have perused the record of the trial court, but have not come across any evidence regarding how LR. No. 209/11924 was allocated to AIC. Apart from the reference by Rev. Ngule and Rev. Mutangili to the land having been allocated in 1990, there is no evidence that the allocated land was un-alienated land, and neither was the letter of allocation produced in evidence. Further, there is no evidence of any compliance with any conditions in the alleged letter of allotment, such as payment of the premium, or stamp duty, or registration fees for the title. Although there was mention of a Part Development Plan having been prepared, there is no evidence regarding who prepared the plan nor is there any evidence of a cadastral survey having been done. In fact, AIC's witness Dr Mutangili conceded that he did not know how the plot was acquired.

47. The information regarding the process of the allocation of the land to AIC was within the special knowledge of AIC. Under section 112 of the *Evidence Act*, the burden was upon AIC to prove that the process of allocation of the land that was allotted to it was done flawlessly, and that the issuance of title to LR. No. 209/11924 arising from the allocation was regular. Without such evidence, AIC cannot rely on the presumption of absolute ownership under section 26 of the *Land Registration Act*. It matters not, that the land Registrar confirmed the authenticity of the title as fraud was not alleged. Moreover, it is possible for the land Registrar to have unwittingly issued the title without the proper procedure of allotment having been followed. We find that the learned Judge failed to properly evaluate and analyze the evidence before her. Consequently, the learned Judge came to a wrong conclusion that LR. No. 209/11924 was available for allocation, that AIC was properly allocated that property, and that its title was indefeasible.

48. The upshot of the above is that the judgment of the learned Judge cannot stand as LR. No. 209/11924 is part of LR. No. 209/13080, which is reserved as Wilson Airport land, and was not therefore available for allocation. In addition, the title to LR. No. 209/11924 issued to AIC was not procedurally issued as the procedure for allocation of unalienated land was not followed.

49. In the circumstances, we hereby allow the appeal, set aside the judgment of the ELC and substitute therefor an order dismissing AIC's originating summons. We award costs of this appeal and costs in the High Court to the Airports Authority.

Those shall be the orders of this Court.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

HANNAH OKWENGU

....

JUDGE OF APPEAL

K.I. LAIBUTA (DR)

....

JUDGE OF APPEAL

J. MATIVO

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR