Waterfront Holdings Limited v Kandie & 2 others (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1223 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 88 OF 2019

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

OCTOBER 6, 2023

BETWEEN

WATERFRONT HOLDINGS LIMITED .... APPELLANT

AND

DAVID KIPKURUI KANDIE .... 1ST RESPONDENT

DISTRICT LAND REGISTRAR, MOMBASA .... 2ND RESPONDENT

COMMISSIONER OF LANDS .... 3RD RESPONDENT

(Being an appeal from the judgement of the Land and Environment Court at Mombasa (A. Omollo, J) dated 15th January, 2019 in ELC Case No. 22 of 2012)

JUDGMENT

1. This appeal arises from the suit filed by the 1st Respondent against the Appellant, and the 2nd and 3rd Respondents, in which the 1st Respondent sought a declaration that he was the lawful owner of, and that the Appellant was a trespasser on LR No. MI/Block XXVI/212 (hereinafter referred to as "the suit property"); an order restraining the 2nd and 3rd Respondents from tampering with the records save as to effect entries reflecting the 1st Respondent as the owner; an order cancelling the Certificate of Lease and entire records purporting to transfer and reflect the Appellant as owner of the suit property; a permanent injunction restraining the Appellant from laying further claims of ownership or from interfering with the title to the suit property; an order for security for costs for Kshs 1,000,000.00; and costs of the suit.

2. In its defence, the Appellant denied the 1st Respondent's claim and counterclaimed for the dismissal of the 1st Respondent's suit; a declaration that the Certificates of Leases issued in the names of John Lemiso Ole Lekakeny and David Kipkurui Kandie are not authentic; a declaration that the Appellant

was the lawful registered proprietor of the suit property; a permanent injunction restraining the 1st Respondent from interfering with the suit property; and the costs of the suit.

3. According to the 1st Respondent, he bought the suit property from one John Lemiso Ole Lekakeny, (hereinafter referred to as Lemiso) PW2, on April 30, 2010 vide an agreement dated January 7, 2010 at the price of Kshs 7.5 million which he duly paid; that the suit property had been allotted to the said Lemiso vide an allotment letter dated April 7, 1994; that a certificate of lease dated May 12, 1998 was subsequently issued; and that after complying with all legal requirements, the lease was issued in his name dated April 30, 2010; that on October 20, 2010, he received a letter from the police concerning a complaint made by the Appellant who were also claiming the same property; and that after investigations, the police found that he was the owner of the suit property and the authenticity of his title as well as that of Lemiso was confirmed by the Office of the Director of Public Prosecution and the Commissioner for Lands.

4. However, the 1st Respondent did not produce the transfer form and disowned the unsigned copy of the transfer form which was annexed to his application for injunction. It was his evidence that the search revealed that he was the owner of the suit property as at 11th March, 2010, a month earlier; that he never sought for the previous rates receipts from Lemiso; that he received his title from his lawyer; that he was the one in possession of the suit property though he was not living there; and that it was only after the police started investigations that the Appellant took its containers there.

5. John Lemiso Ole Lekakeny, who testified as PW2, confirmed that his letter of allotment was issued on April 1, 1994 and the lease issued on May 12, 1998; that he agreed to sell the suit property to the 1st Respondent for the sum of Kshs 10 million out of which the 1st Respondent paid him Kshs 7.5 million with the balance being set off from the amount he owed to the 1st Respondent; and that he paid the rates and handed over the payment receipts to the 1st Respondent.

6. On behalf of the Appellant DW1, Fanuel Chamwoma, testified that the approval for allocation was processed on June 1, 1995 pursuant to an application made on May 27, 1995 and the allotment letter was issued on June 6, 1995; that on June 19, 1995, he made payments of Kshs 311,000/- towards the existing land rents and procured a certificate on July 6, 1995; that when he saw the 1st Respondent's title, he realised that there were two titles, one for the 1st Respondent and one for the Appellant; that he visited the lands office and found the titles for the 1st Respondent and Lemiso in the file; and that the Appellant, being the first owner of the suit property, he lodged a complaint with the police.

7. On behalf of the 2nd and 3rd Respondents, DW2, John Wanjohi Gichuki, a land registration officer, testified that when he was posted to Mombasa in 2009, he came across two sets of registers for the suit property, an occurrence which in his view was irregular; that he then received a letter from the DCIO requesting for the details of both files, a request which he obliged; that he also received certified copies of documents from the Commissioner for Lands certifying that the Appellant was the owner of the suit property as well as a recommendation that the matter be resolved through a civil case; that there were, however, no records of transfer from Lemiso to the 1st Respondent; that he did not know the reasons why the State Counsel exonerated the 1st Respondent from the blame; and that he was unable to state which of the two sets of documents was a forgery.

8. After considering the evidence adduced, the Learned Trial Judge found that though it was alleged that the 1st Respondent's allotment lapsed due to non-payment of the premium, non-payment of rents or rates cannot vitiate a title where there is no evidence that a demand for the same was made; that rate payments were up to date; that first registration does not apply where the processes of registration are running parallel to each other as was the case in this matter; that the doctrine of first in time was in

favour of the 1st Respondent since the allotment to Lemiso was first in time; that the burden of proof shifted to the Appellant to prove that the 1st Respondent's documents were forgeries, a burden which the Appellant failed to satisfy; that the 1st Respondent was the one in possession of the suit property and the Appellant only took its containers thereto upon the commencement of the investigations; and that the 1st Respondent proved its case and its suit was allowed while the Appellant's counterclaim was dismissed.

9. We heard this appeal on the Court's virtual platform on May 23, 2023 on which day Learned Counsel Mr Gikandi Ngibuini appeared with Mr Kabebe for the Appellant while Mr. Ondabu appeared for the 1st Respondent. Though duly served there was no appearance for the 2nd and 3rd Respondents, who had however filed their submissions. Counsel relied on their respective written submissions which they briefly highlighted.

Appellant's Submissions

10. On behalf of the Appellant, it was submitted that from the evidence on record, the suit property was previously un- alienated Government land which was apparently allotted to Lemiso vide a letter of allotment dated 4th April, 1994; that Lemiso did not produce any evidence as to whether he ever accepted the said offer and if so, when he did so; that Lemiso was issued with a Certificate of Lease on 12th May, 1998, four years from the date of the issuance of the said letter of allotment; and that the Appellant was issued with a letter of allotment for the said property on 6th June,1995 and accepted the said offer and paid the revenue of Kshs.311,520/= due to the Government on 12th June,1995; that the Appellant having strictly and fully complied with the conditions set by the Government, the Certificate of Lease issued to the Appellant is a valid one; that as the Respondent completely failed to adduce evidence regarding his compliance with the conditions set by the Government,to validly qualify for the issuance of the certificate of title for the said property, the certificate issued to him stands on quick sand. Reference was made to the decision in *Said Awadhi Mubarak v. Republic* (2014) eKLR and *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR and *Bubaki Investment Company Ltd v National Land Commission & 2 others* [2015] eKLR.

11. It was submitted that the trial court erred in that it failed to completely address itself to the legal consequences of a party such as Lemiso, who failed to comply with the conditions set by the issuing authority so as to validate the issuance of the certificate of lease for the suit property; that based on Section 23 of the *Registration of Titles Act*, 1964 (now repealed) but applicable pursuant to Section 107 of the *Land Registration Act*, 2012, from the date when the Appellant was registered as the owner of the suit property, the said property was thereafter not available for registration in favour of any other party; and that pursuant to Section 26(1) of the *Land Registration Act*, 2012 upon the registration of the Appellant on 6th July, 1995 as the proprietor of the suit property, the Appellant became, in law, the indefeasible owner thereof and such ownership could only be upset if fraud was proved in the manner the said title was acquired. In this regard the Appellant relied on *Bruce Joseph Bockle v Coquero Limited* [2014] eKLR.

12. According to the Appellant since the letter of allotment does not confer any rights known to law, the trial court erred in applying, in relation to the letters of allotment and not the registration, the maxim that where there are two competing equities, the first in time prevails. In support of its submissions, the Appellant cited *Elizabeth Wambui Kiragu v Ndirangu Macharia* [2018] eKLR and *Kamau James Njendu v Serah Wanjiru & another* [2018] eKLR. Based on this Court's decision in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR and it was submitted that despite pursuant to Sections 107 and 108 of the Evidence Act, the 1st Respondent failed to prove his case to the acceptable standards.

13. It was contended that the transfer documents being improper, the entire transfer process did not meet the legal standard as reflected in this Court's decision in *Mistry Amar Sing v Sserwano Wofunira Kulubya* [1963] EA 408.

14. While urging this Court to set aside the judgment delivered in ELC Case No.22 of 2012 between *David Kipkirui Kandie v Waterfront Holdings Limited & 2 others*, so that the respondent's suit thereon is dismissed with costs and the appellant's counter-claim thereon is allowed with costs, the Appellant appreciated that if this court is of the opinion that the safer route is to allow the matter to be re- heard, this court may very well do so, provided the hearing is before any other judge in the Environment and Land Court other that Hon. Justice A. Omollo.

2nd and 3rd Respondent's Submissions

15. On behalf of the 2nd and 3rd Respondents, it was submitted, based on Sections 107 and 108 of the Evidence Act, that 1st Respondent having alleged that alleged that the suit property was transferred to him from Lemiso needed to prove that indeed there was an actual transfer; that the 1st Respondent could not remember having signed the transfer form and did not produce the transfer instrument contrary to Section 37 of the *Land Registration Act*; that there was no evidence that the 1st Respondent complied with the conditions of offer contained in the letter of allotment; that as at 6th June, 1995, when the Appellant was issued with the letter of allotment reference No. 75895/XVI/92 dated 6th June, 1995, no other letter of allotment for the suit parcel of land existed by law; and that the Appellant complied with all the requisite conditions and all the prescribed steps were followed culminating into registration of the Appellant as owner of the suit parcel of land it stopped being unalienated government land and therefore was not available for allocation.

16. It was submitted that evidence produced before court showed that the Certificate of Lease held by Lemiso was not supported by documentation at the Office of the Commissioner of Lands; that the 1st Respondent could not explain how the property moved from Lemiso to him; and that Lemiso and 1st Respondent obtained their title documents irregularly and unprocedurally and reliance was placed on the case of *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another* [2013] eKLR.

1st Respondent's Submissions

17. On behalf of the 1st Respondent it was submitted that there is no appeal pending before the Court as the Appellant did not comply with the mandatory provisions of Order 3 Rule 9 of the *Civil Procedure Rules*, 2010; and that the Appeal having been withdrawn, there is no pending appeal to be determined. In this regard reference was made to Start Sime's "*A Practical Approach to Civil Procedure*" 9th edition and *Bahati Shee Mwafundi v Elijah Wambua* [2015] eKLR, Nveri Court of Appeal Civil Appeal No, 279 of 2007: *Ephraim Mbae 2 Others v Gilbert Kabeere M 'Mbjiiiwe*.

18. As regards the merits of the appeal, it was submitted that a letter of allotment issued to Lemiso having been issued earlier than that of the Appellant, the Learned Judge cannot be faulted as there are parallel registers and both the titles and the process was parallel; that Lemiso having been allotted the suit property on 4th April, 1994 and issued with a lease of 99 years it then follows that the property known as Mombasa MI/Block XXVI 212 was not available for allotment and we were urged to uphold Superior Court's findings; and that in the absence of evidence form the allotting authority, the Commissioner of Lands, that there was non-compliance with the conditions, the Appellant's contention that there was non-compliance had no basis. Reliance was placed on the decision of this Court in Civil Appeal No. 128 of 2018: *Swaleh Mohamed Waziri & 3 others v Houd Mohmoud Athman & another.*

19. It was submitted that the learned correctly found, based on the evidence, that the 1st Respondent properly acquired the suit property; that the Appellant having failed to sue the original allottee, Lemiso, by suing the 1st Respondent a purchaser for value, the Respondent was on a fishing expedition. In this regard the 1st Respondent relied on this Court's decision in Magdalene Jelagat Chemirmir & Another v Dora Nyambura Maina & another Nairobi Civil Appeal No. 7 of 2012 and on Eldoret Court of Appeal Civil Appeal No. 115 of 2017: Philemon L Wambia versus Gaitano Lusitsa Mukofu & 2 others.

Analysis and Determination

20. We have considered the issues raised in this appeal. Before we deal with the merits of this appeal, the 1st Respondent has raised two issues touching of the competency of the appeal. The first issue is that that there is no appeal pending before the Court as the Appellant did not comply with the mandatory provisions of Order 3 Rule 9 of the *Civil Procedure Rules*, 2010 since the current advocates for the Appellant, Ms Gikandi & Co. Advocates came on record after judgement had been entered and neither sought leave of the court to do so nor obtained the consent of the advocates who were on record in the High Court. It is however not contended that there was another firm of advocates on record before this Court prior to the said firm of Gikandi & Co. Advocates coming on record. This Court has had an occasion to deal with that issue in *Bahati Temo & Others v. Swafiya Abdalla & Another* Mombasa Court of Appeal Civil Application No. E005 of 2019 where the decision by Deverell, JA in *Shah v. Kenbox Industries Ltd* [2005] 1 KLR 822 was cited in which he expressed himself as hereunder:

> "It is doubtful whether a single judge can make a finding that notices of appeal or other documents listed in rule 51(2), which have not been struck out as being invalid, are nevertheless to be treated by him to be nullities when acting as a single judge for the purposes of an application for extension of time...Whereas there is a specific reference in rule 5(2)(a) and (b) to the necessity for the existence of a Notice of Appeal having been given or lodged, there is no such requirement expressed in rule 4. It would therefore seem that there is no reason why the Judge should consider himself as lacking jurisdiction as a single judge to make orders extending time for the filing of a Notice of Appeal in a situation where either no Notice of Appeal has yet been filed or where the Notice of Appeal, which has been filed is defective...Rule 22 of the Court of Appeal Rules deals with appearances. There is a distinction between "appearance" and "signing". The former deals with the presence in Court or chambers at the hearing of an appeal or application while the latter deals with execution of formal documents such as notices of appeal and notices of motion etc. There is no provision in the Rules importing into the Court any of the *Civil Procedure Rules* relating to change of advocates. There is no reference in rule 22 or 23 to the advocate on record in the Superior Court having to be the advocate for the appellant for the purpose of signing the Notice of Appeal or any application in relation to the appeal until changed in accordance with rule 23...Rule 76(2) does not deal with the authority to sign but only deals with the address for service of the notice of Appeal. The rule expressly states that the address for service may be that of an advocate who has not been retained for the purposes of the appeal. The expression "be considered the advocate of the party" enables the other party to treat the former advocate as still having authority to take any steps in relation to the matter. But these words do not prevent a new advocate who has been authorised and instructed by his client so to do and in respect of whom there has been compliance with Order 3 (9A), from validly performing that task. Provided that he has actual authority then his authorised actions are not rendered void by this provision. He has signed the notice of appeal "on behalf of the appellant" which is the only relevant requirement in rule 74(6)...Therefore the Notice of

Appeal and a Notice of Motion in the Court of Appeal can be signed by any advocate who has, as a matter of fact, the authority of the intended appellant to sign the notice irrespective of whether or not the advocate is or is not on the record, or considered the advocate of the party in the High Court."

21. In the same case, this Court adopted with approval the decision by Musinga, JA in *Mary Nchekei Paul v Francis Mundia Ruga* [2019] eKLR where the Learned President of this Court expressed himself as hereunder:

> "This Court has its own rules of procedure, the *Court of Appeal Rules*, and the cited provisions of the *Civil Procedure Rules* are therefore inapplicable. Rule 23 of the *Court of Appeal Rules* that addresses the issue of change of advocate states as follows:-
>
> "(1) Where a party to any application or appeal changes his advocate or, having been represented by an advocate, decides to act in person or, having acted in person, engages an advocate, he shall, as soon as practicable, lodge with the Registrar a notice of the change and shall serve a copy of such notice on the other party or on every other party appearing in person or separately represented, as the case may be.
>
> (2) An advocate who desires to cease acting for any party in a civil appeal or application, may apply by notice of motion before a single Judge for leave to so cease acting, and such advocate shall be deemed to have ceased to act for such party upon service on the party of a certified copy of the order of the judge."
>
> M/s G.M. Wanjohi Advocates never acted for the applicant in this matter, they represented her before the trial court. The application before me was filed by C.M. King'ori Advocates. It is a fresh application and so the said advocates are properly on record. If the application had been filed by M/s G.W. Wanjohi Advocates then M/s C.M. King'ori Advocates would have been required to comply with rule 23 of the Court's Rules but that is not the case."

22. The Court concluded that:

> "Though these decisions were made by the single judges of this Court we hold the view that the opinions expressed therein is the correct legal position. An advocate who has been instructed to commence legal proceedings in this Court does not require to file a notice of appointment of advocate or notice of change of advocates the proceedings herein being fresh proceedings which are commenced under the *Court of Appeal Rules*, just like the advocate filing a plaint or any other originating pleadings in the High Court."

23. The rationale for the reluctance by this Court to apply the *Civil Procedure Rules* hook, line and sinker was expressed by this Court in *Rafiki Enterprises Ltd. v Kingsway Tyres & Automart Limited* Civil Application No Nai 375 of 1996 where the Court expressed itself as hereunder:

> "The provisions of the *Civil Procedure Act* do not apply to the Court of Appeal and the reason(s) for that is not difficult to understand. The Court of Appeal has its own rules of procedure and those rules cater for virtually all situations which may arise during the hearing of an appeal. It is accordingly not necessary for the Court of Appeal to have recourse to the provisions of the *Civil Procedure Act* and the rules made thereunder. Nor can the provisions of section 3 of the *Appellate Jurisdiction Act* be of assistance to the applicant.

Those provisions merely set out the jurisdiction of the Court of Appeal and cannot provide the basis for making the kind of orders the applicant seeks from us."

24. We therefore find no merit in the first objection. We hold that as far as these proceedings were concerned it was not necessary to seek leave of the court below to come on record.

25. As regards the second objection, it was submitted that the Appellants filed a Notice of Withdrawal of Appeal and a payment receipt issued thereto. Therefore, it was contended there is no pending appeal to be determined.

26. Rule 98 of the *Court of Appeal Rules* provides that:

    1. An appellant may, at any time after instituting an appeal and before the appeal is called on for hearing, lodge in the appropriate registry notice in writing of the intention to withdraw the appeal.

    2. The appellant shall within seven days after lodging the notice under sub-rule (1), serve copies thereof on each respondent who has complied with the requirements of rule 81.

    3. If all the parties to the appeal consent to the withdrawal of the appeal, the appellant shall file, in the appropriate registry, a consent letter signed by the parties or their advocates and thereupon the appeal shall be struck out of the list of pending appeals by the Registrar.

    4. If all the parties to the appeal do not consent to the withdrawal of the appeal, the appellant may, before the conclusion of its hearing, apply for leave to withdraw the appeal before a single judge.

    5. An application for withdrawal of the appeal under sub-rule (4) may be made informally in court on the date of the hearing.

27. Our view of subrule (1) of the above rule is that an appellant who intends to withdraw an appeal is required to file a notice in writing of the intention to withdraw the appeal. In other words, the document that the party files is only an intimation of the desire to withdraw the appeal. Until it is acted upon by the Court or the Deputy Registrar of the Court, where such power is conferred on the Deputy Registrar, that document remains just an intimation or a desire to be acted upon. It does not, without more, effectively withdraw the appeal. Therefore, without determining the validity of the purported notice, we find that this appeal was not procedurally withdrawn and is properly before us. Secondly, if the 1st Respondent was of the view that there was a valid notice, he ought to have taken steps to have the proceedings terminated.

28. In our holding, the decision in *Ephraim Mbae 2 Others v Gilbert Kabeere M 'Mbjiiiwe* (*supra*) in so far as it was dealing with a validly withdrawn suit is not of much help to the 1st Respondent.

29. Having disposed of the two preliminary issues, we now turn to the determination of the merits of the appeal. This being the first appeal, in *Selle v. Associated Motor Boat Co*. [1968] EA 123 that:

    " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular

circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

30. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties. The Court's mandate as re-affirmed in *Abok James Odera t/a A. J. Odera & Associates v. John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR is:

> "...to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

31. However, this Court (Apaloo, JA, as he then was) in *Kiruga v Kiruga & Another* [1988] KLR 348, while dealing with what amounts to proof, cited *Watt v Thomas* [1947] AC 484; *Peters v. Sunday Post Ltd* [1958] EA 424 and expressed itself as hereunder:

> "An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. It is a strong thing for an appellate court to differ, from the finding, on question of facts, of the Judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon evidence should stand. But this is jurisdiction, which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

32. This Court (per Hancox, JA, as he then was), in *Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183, held that:

> "The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."

33. In our view, the real issue for determination in this appeal is this: under what circumstances can an allottee of a public land lose that allotment and whether in the circumstances of this case, Lemiso, an allottee of the suit land lost his allotment of the suit property by the time the subsequent allotment was made to the Appellant.

34. According to the 1st Respondent, the said Lemiso, from whom he purchased the suit property was allotted the same vide an allotment letter dated 7th April, 1994. It is not in doubt that the said Lemiso held a Certificate of Lease dated 12th May, 1998. According to the said letter of allotment, unless the stand premium payment was made within 30 days from the date of the letter, the offer would be considered to have lapsed. As to whether or not the payment was made was a matter within the unique knowledge of Lemiso and the 2nd and 3rd Respondents. Neither of them were of any assistance to this Court in that regard. The said Lemiso was called as the 1st Respondent's witness and in his testimony, he never mentioned that he duly complied with the said condition within the stipulated period. Similarly,

DW2 did not, in his evidence allude to the fact of payment of stand premium. Section 109 of the *Evidence Act* which provides for the evidential burden of proof states that:

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

35. Similarly, section 112 of the same *Act* provides that:

> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

36. This Court in *Anne Wambui Ndiritu v. Joseph Kiprono Ropkoi & another* [2005] 1 EA 334, held that:

> "As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

37. In this case, since the 1st Respondent's title was being challenged, it was upon him to prove that the process under which he acquired his title was proper. This was appreciated by this Court in *Embakasi Properties Limited & another v Commissioner of Lands. and another* [2019] eKLR where it was held that; -

> "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."

38. We find that the feeble attempt by the 1st Respondent to pass the buck to the Commissioner unconvincing. We agree with the decision in *Gibbs v Messer* (1891) AC 248 that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's right. However, that decision, itself, qualifies that right by stating that the protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register.

    Those who deal not with the registered proprietor, but with a stranger who uses his name, do not transact on the faith of the register; and they cannot by registration of an improper instrument acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration.

39. It is now law that the mere fact of issuance of a title deed does not confer the status of indefeasibility of title. Courts of this country have therefore held that they would not hesitate to nullify titles held

by those who stare at the court and wave a title of a grabbed land by merely and pleading loudly the principle of the indefeasibility of title deed. In cases where the very process of acquisition of the land in question is under challenge, it is not enough to simply rely on the title. It was therefore held by this Court in *Munyu Maina v Hiram Gathina Maina* [2013] eKLR 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 that is under challenge and the registered proprietor must go beyond the instrument and prove 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."

40. In the case of *Funzi Development Ltd & Others v County Council of Kwale*, [2014] eKLR this Court's decision which was affirmed by the Supreme Court, was to the effect 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."

41. In this case, the 1st Respondent's title was being challenged on the ground that due to non-compliance with the conditions for the issuance of a certificate of lease, the letter of allotment issued to Lemiso had lapsed and therefore no valid title or interest could pass from Lemiso to the 1st Respondent. In attempt to rebut this, the 1st Respondent called, as his witness the allottee from whom he obtained his title, Lemiso. However, Lemiso's evidence fell short of proving that he paid the stand premium required, at least not within the stipulated period of 30 days.

42. Notwithstanding that, it is clear that the lease was issued to Lemiso, albeit after the lease to the Appellant had been issued. There is no evidence and DW2 testified that he was unable to say if any of the two leases was a forgery. Section 119 of the Evidence Act provides that:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

43. Though there were letters from the Commissioner for Lands which purported that the 1st Respondent's title was procured by forgery, the author of the said letters was never called to testify hence the said averments remain mere allegations with little if any evidential value. In light of the above provision, we proceed on the premise that, the 1st Respondent's Certificate of Lease must have been issued after the stand premium was paid. However, as there is no evidence that it was paid before the lapse of the 30 days period, like the Learned Judge found, a finding which is not being challenged before us, we will proceed on the premise that it was not paid within the said period.

44. On the other hand, there is no dispute at all that the process of issuance of the lease to the Appellant went through all the prescribed steps for the issuance of the lease and culminated into the issuance of the lease to him before the lease to Lemiso was issued. That finding leads to the ultimate question of the fate of the failure to comply with the conditions for allotment of public land within the time

stipulated in the letter of offer. This Court, in *Philemon L Wambia v Gaitano Lusitsa Mukofu & 2 others* [2019] eKLR expressed itself as follows:

> "From the foregoing statement, the trial court arrived at a finding of fact that the first allotment was to Mr. Joseph Muturi Muthurania... On our part, we have considered the evidence on record on the two letters of allotment. The evidence on record shows that the first allotment to the suit property was to Mr. Joseph Muturi Muthurania. In *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, this Court stated that an allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the second letter of allotment to the appellant did not attach in rem to any land since there was no parcel upon which the allotment could attach. The first allotment to Mr. Joseph Muturi Muturania effectively made the suit property unavailable for allotment to the appellant the more when the first allottee had fulfilled the terms and conditions of the allotment."

45. In that case what was in issue was whether a second allotment can validly be made in circumstances where an earlier allotment had been made. That Court found that that was not possible. That was the position this Court adopted in the case of *Kenya Ihenya Company Limited & Another v Njeri Kiribi* [2019] eKLR where it was again stated;

> "... it was clear that the 1st appellant had allotted the suit land to both the respondent and the 2nd appellant hence the learned Judge's conclusion that there was a double allocation. That being the case, since the respondent was first in time, as the evidence is clear that she completed making payments in the year 1983 whilst the 2nd appellant claimed to have purchased the same on 24th June, 1997, she was the bonafide proprietor."

46. However, in both cases, the Court did not deal with the issue of the first allotment lapsing as a result of failure to comply with the conditions in the allotment letter regarding the timelines for payment of the stand premium.

47. Where an allotment is made to two competing parties one of whom pays for the allotment before the other one, this Court in *Kenya Ihenya Company Limited & another v Njeri Kiribi* (*supra*) held that;

> "... it was clear that the 1st appellant had allotted the suit land to both the respondent and the 2nd appellant hence the learned Judge's conclusion that there was a double allocation. That being the case, since the respondent was first in time, as the evidence is clear that she completed making payments in the year 1983 whilst the 2nd appellant claimed to have purchased the same on 24th June, 1997, she was the bonafide proprietor."

48. The position reflects the equitable maxim that where there are equal equities, the first in time prevails. See *Lukwago v Kizza & Another* [1999] 2 EA 142. However, the maxim only applies where the equities are equal. That is our understanding of the decisions in *Elizabeth Wambui Kiragu v Ndirangu Macharia* [2018] eKLR and *Kamau James Njendu v Serah Wanjiru & another* [2018] eKLR where in the former case the court had this to say;

> Further, there are two competing titles herein over Ruiru Kiu Block 2/2820, which parcel of land lie on Index Map Sheet No.4. The Plaintiff obtained her title deed over Sheet No,4 on 7th September 2010, and the Defendant obtained his in the year 2011. Therefore, this Court finds that the Plaintiff's title is the first in time and should therefore prevail. The Court will rely on the maxim of Equity which states; "when two equities are equal, the first in time

prevails". See the case of *Gitwany Investment Ltd & 3 Others... v... Commissioner of Lands*, HCCC No. 1114 of2002, where the Court held that:-

> "The first in time prevails so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently are and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail...Having found that the Plaintiff's title deed is the first in time and that it should prevail, then the Court further finds as a holder of Certificate of registration, shes deemed to be the absolute and indefeasible owner. "

49. In this case the equities are not exactly equal since in one case, the allotment was made earlier but payment made later and by the time the Certificate of Lease pursuant to that allotment was issued a subsequent allotment had been made and certificate of lease issued pursuant to the latter. In the case of *M'Ikiara M'Rinkanya and Another v Gilbert Kabeere M'Mbijiwe* [1982 – 1988] 1 KAR 196 this Court held that;

> " Where a similar situation as in this case arose, there was a double allocation to a plot issued by the Council of the area. The court had noted that the said first allotted letter to the original plaintiff had never been cancelled. That the council had no power to allocate the same property again without following the laid down procedure of re-allocating the property."

50. Again, the position in that case is not on all fours with the current one since as opposed to the instant case where there is evidence that the procedure for allocation of land was followed in respect of the Appellant, in the above case the procedure was not followed in the reallocation.

51. Similarly, this Court in *Magdalene Jelagat Chemirmir & another v Dora Nyambura Maina & another* [2015] eKLR dealt with a case where the Government had allotted land to a party from whom the 1st to 3rd Respondents obtained their interest many years before. However, the same land was purportedly allotted to the original allottees once again who now purported to transfer their letter of allotment to the appellant in that case. The Court had no difficulty in finding that:

> " ...the Government gave a grant of lease over the suit land to the 1st to 3rd respondents many years ago. Then later, by whatever methods the said original allottees obtained a letter of allotment over the same land issued by the Commissioner of Lands (5th respondent). Those allottees sold "the letter" to the appellant company and that provoked the respondents to sue seeking orders including cancelling the title issued to the appellant over the land. The High Court decided and this Court agreed that the first grant to the respondents ranked in priority over the later allotment to the appellant. And by the operation of law, the allotment to the appellant was of no effect since there was no land to alienate, the respondents having been given the land long before."

52. Just as in the previous case, the issue as to whether the stand premium for the first allotment was paid or not was not an issue. However, this Court in *Swaleh Mohamed Waziri & 3 others v Houd Mohmoud Athman & another* [2020] eKLR held that:-

> "...an allottee having been allotted land by the Commissioner of Lands and duly paid all the stand premiums and other related charges, is considered to have acquired rights over such land, which thereafter rendered it unavailable for allocation to other persons or entities."

53. There is therefore no difficulty in situations where an allottee has duly paid the stand premiums and related charges and the title documents issued. In those circumstances, the allottee, now the registered proprietor, acquires all the rights to that land hence removing the land from the ambit of further allotment. That position is reflected in this Court's decision in *Dr. Joseph N K Arap N'gok v Justice Moijo Ole Keiwua & others* Civil Application No. Nai. 60 of 1997 where this Court held that title to landed property can only come into existence after the issuance of the letter of allotment meeting the conditions stated therein and actual issuance thereafter of title documents pursuant to the provisions under which the property is held.

54. From the foregoing, the legal position is not that once issued, the letter of allotment lasts indefinitely. There must be an acceptance of the offer to allot the land by the allottee fulfilling the conditions specified for the said allotment. To that extent, we associate ourselves with this Court's decision in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR which express the general law in contractual matters.

> " It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration."

55. The question however is whether the failure to comply with the requirement for payment of stand premium automatically cancels the offer or something more is required to be done by the allotting authority to denote that cancellation. To answer this question, we need to interrogate the legal status of the letter of allotment. The Supreme Court in *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), while dealing with the issue, expressed itself as hereunder:

> "[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...
>
> 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 fulfilment 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....
>
> 61. ...We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an Allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.
>
> 62. Back to the facts of this case, the Allotment Letter issued to Renton Company Limited was subject to payment of stand premium of Kshs. 2,400,000.00,

annual rent of Kshs. 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.

63 While the allotment letter is dated 19th December 1999, Renton Company Limited made the specified payments on 24th April 2001, one hundred and twenty seven (127) days from the date of the offer. It is not in question that Renton had not complied with the terms and conditions of the Allotment Letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant. The respondent submitted that a Letter of allotment does not confer any property rights unless it is perfected, failure to which it is rendered inoperative and of no legal import. We have already declared that an Allotment Letter, even if perfected, cannot by and in itself confer transferable title to the Allottee, unless the latter completes the process by registration. Therefore, the grim reality is that all transactions between Renton Company Limited and the appellant were a nullity in law."

56. We must, however, point out, based on the case of *M'Ikiara M'Rinkanya and Another v Gilbert Kabeere M'Mbijiwe* [1982 – 1988] 1 KAR 196, that where the allotment lapses due to the failure by the allottee to meet the conditions in the letter of allotment, the subsequent re-allotment, to be properly valid, must follow the prescribed process of allotment of land and the failure to do so would lead to the resulting title being cancelled as well. That process was restated by the Supreme Court in Petition No. 8 (E010) of 2021: *Dina Management Ltd v County Government of Mombsasa and 5 others* [2023] KESC 30 where it held that:

> "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 The Hon. 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.'
>
> This process is restated in *African Line Transport Co. Ltd v The Hon. 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."

57. In the matter before us, the 1st Respondent failed to discharge the burden of proving that Lemiso, from whom he claimed his title, met the conditions in the letter of allotment and that by the time the process of re-allotment to the Appellant commenced, he had done so. Accordingly, the re-allotment of and issuance of title of the subject property to the Appellant cannot be faulted and the subsequent issuance of the Certificate of Lease to Lemiso was inconsequential. That title was not based on any letter of allotment, a prerequisite for allotment of un-alienated government land. It follows that the 1st Respondent could not acquire a valid title from Lemiso.

58. We therefore find merit in this appeal which we hereby allow. We set aside the judgement of the trial court and substitute therefor an order dismissing the 1st Respondent's suit and enter judgement for the Appellant against the 1st Respondent as prayed in the counterclaim.

We, accordingly, declare that the Certificates of Leases issued in the names of John Lemiso Ole Lekakeny and David Kipkurui Kandie are not authentic and a that the Appellant is the lawful registered proprietor of the suit property. Consequently, we issue a permanent injunction restraining the 1st Respondent from interfering with the suit property. We award the costs both here and in the court below to the Appellant.

59. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER, 2023.

S. GATEMBU KAIRU, FCIArb.

....

JUDGE OF APPEAL

P. NYAMWEYA

....

JUDGE OF APPEAL

G. V. ODUNGA

....

JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR