



REPUBLIC OF KENYA



**Green & another v Kazungu & 2 others (Civil Appeal E017 of 2020)  
[2022] KECA 991 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KECA 991 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL E017 OF 2020  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
SEPTEMBER 23, 2022**

**BETWEEN**

**DAVID RODNEY GREEN ..... 1<sup>ST</sup> APPELLANT**

**DEBORAH JANE GREEN ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DIRECTOR OF LAND ADJUDICATION % SETTLEMENT ... 1<sup>ST</sup> RESPONDENT**

**JOE KAZUNGU YAA MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY LAND REGISTRAR KILIFI ..... 3<sup>RD</sup> RESPONDENT**

*((Being an appeal from the judgment delivered by Hon J.O.  
Olola on 6th May 2020 in Malindi ELC Case 25 of 2018))*

**JUDGMENT**

1. The 1<sup>st</sup> respondent, by a plaint filed before the Kilifi Principal Magistrate's Court sued the Director of Land Adjudication and Settlement and the County Land Registrar, Kilifi, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively in this appeal, seeking judgment against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in terms of orders as follows:
  - a. A declaration as obsolete and a nullity a lease dated 22<sup>nd</sup> July 1974 to Cornel Paul Okech entered in the encumbrances section of the Green Card to Land Parcel No. 182 Mtondia.
  - b. A mandatory injunction directed at the 2<sup>nd</sup> respondent to accept from the 1<sup>st</sup> respondent outright purchase payment of Kshs. 32, 801/= in respect of Plot No. 182 Mtondia Settlement Scheme.



- c. An order directed at the 2<sup>nd</sup> respondent to document Plot No. 182 Mtondia Settlement Scheme accordingly and surrender all particulars to the 3<sup>rd</sup> respondent for him to issue title documents to the 1<sup>st</sup> respondent as owner thereof.
2. In the plaint the 1<sup>st</sup> respondent pleaded that he was the lawful allottee from the Government of Kenya through the Settlement Fund Trustees of Plot No. 182 Mtondia Settlement Scheme, hereinafter the suit land, vide a letter dated 25<sup>th</sup> August 2014. That he tendered to the 2<sup>nd</sup> respondent Kshs. 32, 801/= being Outright Purchase Fee but that the 2<sup>nd</sup> respondent declined and that instead he wrote on 2<sup>nd</sup> September 2014 asking him to surrender the original Letter of Offer pending resolution in regard to an existing lease over the suit property. The 1<sup>st</sup> respondent pleaded further that he had carried out a search over the suit land and found that the said existing lease is obsolete and a nullity ab initio. That consequently he declined to surrender the Letter of Offer and instead preferred the suit.
3. In the filed defence of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents they pleaded that upon a perusal of all the documents in their records it was clear that the suit land was first registered under a leasehold tenure on 22<sup>nd</sup> July 1974 in favour of Cornel Paul Okech. They pleaded that Christopher O. Okech and John Odhiambo Okech were both registered as Personal Representatives on 21<sup>st</sup> January 1999 and a Certificate of Lease issued to both of them on the same day. That the lease was on 30<sup>th</sup> April 1999 transferred to David Rodney Green and Deborah Jane Green (the appellants) and a Certificate of Lease issued to them on the same day. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents pleaded further that the Government of Kenya as the first registered proprietor had on 25<sup>th</sup> February 1981 transferred the suit land to the Settlement Fund Trustees Nairobi for proper administration notwithstanding the few lease titles already issued by the Government.
4. The appellants on the 2<sup>nd</sup> December 2014 successfully applied to be enjoined in the suit, and were directed to file their statement of defence which they did on the 10<sup>th</sup> March 2015 as the 3<sup>rd</sup> and 4<sup>th</sup> defendants. In their defence the appellants pleaded that they were the registered proprietors of the suit land having purchased the same on 19<sup>th</sup> January 1999, and a Certificate of Lease issued on 30<sup>th</sup> April 2013. They also pleaded that after purchasing the suit land they paid compensation to the tune of Kshs. 145, 000/= to three persons who had occupied portions of the suit land, Karisa Katana Zarume, Charles Mwambire Kigombe and Kavumbi Baya Thoya.
5. The appellants challenged the Kilifi Principal Magistrates' Courts jurisdiction to entertain the suit following which the suit was transferred to Malindi Environment and Land Court on 21<sup>st</sup> February 2018, where it was heard and determined.
6. After considering the evidence before him, the learned trial judge found that as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had acknowledged in their filed defence that the property had been transferred by the Government to the Settlement Fund Trustees in 1981, and that it was incumbent on the appellants to demonstrate clearly how they came to acquire title to the suit land, which he found they failed to do. The learned trial judge found, based on the Letter of Offer issued to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> respondent on the 25<sup>th</sup> August 2014, that the 1<sup>st</sup> respondent had a legitimate expectation that he was entitled to be issued with the title documents upon compliance with the conditions set out in the Letter of Offer. He found that the 2<sup>nd</sup> respondent's refusal to receive the purchase price for the suit land from the 1<sup>st</sup> respondent was in violation of the legitimate expectation. The learned Judge proceeded to find that the 1<sup>st</sup> respondent's suit had merit and allowed it as pleaded in the plaint.
7. The appellants were aggrieved by the judgment and therefore filed this appeal.



The memorandum of appeal has 11 grounds but having considered them we find that they can be summarized into 6 grounds. The judgment of the learned judge is challenged:- for nullifying the appellants' title over the suit land yet the proprietorship and the title were not challenged by the respondents; for failing to appreciate that by virtue of their certificate of lease the suit land was not available for alienation; for giving the declaration sought that the lease dated 22<sup>nd</sup> July 1974 to Cornel Paul Okech over the suit land was obsolete and a nullity without any legal basis or any particulars pleaded or evidence adduced in support of the said declaration, and further without having the said Cornel Paul Okech enjoined in the suit; for failing to apply the provisions of Section 26 of [Land Registration Act](#); for shifting the burden of proof against the appellants; for relying on documents that were not produced in court as exhibits; and for misapplying the principle of legitimate expectation. The appellants seek to have the suit [ELC No. 25 of 2018] before the ELC dismissed with costs. That this court makes any further orders as it shall deem fit and award the costs of the appeal to the appellants.

8. The appeal was heard virtually on the 12<sup>th</sup> April 2022. Learned counsel Mr. Oscar Litoro urged this appeal on behalf of the appellants and relied on the written submissions and list of authorities both dated 7<sup>th</sup> October 2021; and on the supplementary written submissions and supplementary list of authorities dated 11<sup>th</sup> January 2022 and filed on 31<sup>st</sup> January 2022. Learned counsel Mr. Obaga represented the 1<sup>st</sup> respondent and relied on their submissions filed on 11<sup>th</sup> April 2022. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were represented by Ms. Lutta learned State Counsel. They did not file any submissions, nor had the two respondents called any evidence before the ELC. Counsel urged that they were leaving it to the court to determine.
9. Mr. Litoro for the appellants urged that the appellants' case is that the ELC tried a case that was not before it in that facts relied on by the 1<sup>st</sup> respondent were neither pleaded nor particularized, and that thus the ELC effectively declared as a nullity the title of a person who was not named as a party in the plaint, and neither was he a defendant nor an interested party in the suit. That the declaration consequently affected the appellants' title, yet the sanctity of their title was protected under Section 26 of the [Land Registration Act](#), which provides that a title cannot be cancelled unless on grounds set out under Section 26 (1) of the [Land Registration Act](#) of 2012. Mr. Litoro urged that the 1<sup>st</sup> respondent's plaint alleged that the title of one Cornell Paul Oketch was obsolete and a nullity, and sought a declaration to that effect yet there were no particulars pleaded to show how that title was obsolete or a nullity. Counsel relied on Order 2 Rule 4(1) and Order 2 Rules 10 of the Civil Procedure Rules for the proposition that pleadings should be clear and particulars relied upon must be pleaded.
10. Mr. Litoro maintained that the suit land was not available for allocation in view of the certificate of lease held by the appellants. Counsel urged that the learned judge shifted the burden of proof to the appellants to prove how the land which was still registered under the Settlement Fund Trustees could be allocated to them in 1999. Counsel urged that the ELC failed to appreciate that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their statement of defence admitted that the title held by the appellants was good. He cited the case of [Rep. v Non-Governmental Organizations Coordination Board Ex Parte Evans Kidero Foundation](#) (2017) eKLR for the proposition that a court cannot issue a declaration against a person who was not party to the suit. Counsel posited that the court misapplied the principle of legitimate expectation; that no legitimate expectation could arise if the 1<sup>st</sup> respondent did not comply with the requirements of the 2<sup>nd</sup> respondent's offer letter dated 2<sup>nd</sup> September 2014. Counsel took issue with the court's reliance on documents filed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that were not formally produced in court as evidence since both respondents called no witnesses at the trial; and for that proposition cited the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* (2015) eKLR.



11. Mr. Obaga for the 1<sup>st</sup> respondent in his submissions urged that he wished to raise two issues. Counsel submitted that the learned ELC judge rightly invoked the doctrine of legitimate expectation after he looked at the totality of the circumstances as to how the respondent was granted the letter of offer and on the basis that he had been living on the land for years and had made developments thereon. Counsel urged that the doctrine of legitimate expectation as a doctrine does not have to be pleaded in the plaint and there is no requirement or circumstances which dictate that the doctrine can only be invoked if it was pleaded in the plaint. Counsel urged that the ELC correctly cited and relied upon the Supreme Court decision of *Communication Commission of Kenya & 5 Others V. Royal Media Services and 5 Others, SC Petition No. 14 of 2014* [2014] eKLR..
12. Mr. Obaga submitted that the appellants acknowledged that at the time they purchased the suit land they knew the property was within Mtondia Settlement Scheme. That this being a property under a Settlement Scheme it could not have been available for purchase by foreigners as of 30<sup>th</sup> January 1981. Mr. Obaga urged the court to dismiss the appeal with costs.
13. This is a first appeal. We have considered the appeal and the submissions and re-appraised the evidence in accordance with our mandate under Rule 31(1) (a) of the Court of Appeal Rules, 2022 with a view to drawing inferences of fact., It is our duty to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned ELC Judge should hold. In the case of *Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212* this Court espoused that duty as follows:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
14. In the case of *Selle and another vs. Associated Motor Boat Co. Ltd [1968] EA 123* the Court of appeal held:

“The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.” *United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd [1985] eKLR.*”
15. In addition to the above parameters, we are alive to the fact that this Court should only interfere with the findings of the trial court where the decision is based on no evidence or on a misapprehension of the evidence or where the trial court is demonstrably shown to have acted on wrong principles in reaching its findings. *See Mwanasokoni V. Kenya Bus Services [1985] KLR 931.*
16. The issues for determination are whether the propriety of the appellants’ title to the suit land was an issue before the ELC; whether the 1<sup>st</sup> respondent demonstrated that the lease issued to Cornel Paul Okech was fraudulent; whether the court could make adverse orders affecting a person not a party to the suit; and whether the doctrine of legitimate expectation applied to the case.



17. The 1<sup>st</sup> respondent's case before the ELC hinged on two documents, one the Letter of Offer issued to him by the 2<sup>nd</sup> respondent, dated 25<sup>th</sup> August 2014 and two, results of a search he allegedly made on the records held at the Land Registry, which results were not availed to the ELC. On the basis of these two documents, the 1<sup>st</sup> respondent filed suit before the ELC asking for three orders. Two of these orders are the critical ones and are i) a declaration as obsolete and a nullity a lease dated 22<sup>nd</sup> July 1974 to Cornel Paul Okech entered in the encumbrances section of the Green Card to Land Parcel No. 182 Mtondia. ii) A mandatory injunction directed at the 2<sup>nd</sup> respondent to accept from the 1<sup>st</sup> respondent Outright Purchase Payment of Kshs. 32, 801/= in respect of Plot No. 182 Mtondia Settlement Scheme.
18. The first issue for determination is whether the propriety of the appellants' title to the suit land was an issue before the ELC. In the 1<sup>st</sup> respondent's plaint before the ELC, at paragraph 4, he pleaded that he was the lawful allottee of the suit land from the Government through the Settlement Fund Trustee. At paragraph 5 he pleads that he was aware of the boundaries of the suit land. Nowhere does the 1<sup>st</sup> respondent mention the appellants or their title to the suit land, neither does he make any adverse claims against the title held by the appellants. Likewise in his written statement in support of his claim he made no reference to the appellants or their title to the suit land. It is only in his testimony in court that the 1<sup>st</sup> respondent brought in the appellants. The 1<sup>st</sup> respondent in his evidence in chief stated; "The 3<sup>rd</sup> and 4<sup>th</sup> defendants [the appellants in this appeal] are claiming Parcel No. 182 Kilifi/Mtondia. It is not theirs. They are using false documentation. The documents have no relation to the land and must have been acquired corruptly... were forgeries."
19. The ELC did not set out the issues for determination. The ELC, after analyzing the evidence before it proceeded to find that the appellants had not produced anything before Court to demonstrate that they had passed any consideration before acquiring title to the suit land. The ELC further found that given the acknowledgment by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their pleadings that the property had been transferred by the Government to the Settlement Fund Trustee in 1981, it was incumbent upon the appellants to demonstrate clearly how they came to acquire title to the said property.
20. The Supreme Court of Kenya in its ruling in the case of *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR found and held as follows in respect to the essence of pleadings:
- "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings..."
21. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of *Nigeria in Adetoun Oladeji(NIG) vs. Nigeria Breweries PLCSC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
- ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their



pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

22. Flowing from the above cases of *Raila Amolo Odinga & Another vs. IEBC & 2 others*, (supra), and *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others*, (supra), it is a settled principle of law that a party should not be allowed to depart from their pleadings, or to rely on any evidence led by any of the parties which does not support the averments in the pleadings, or which is at variance with the pleadings. The 1<sup>st</sup> respondent put forward evidence which was at variance with his pleadings, claiming the appellants had forged documents in support of their claim to the suit land. The learned ELC relied on that evidence and made issue with the appellants documents of title to the suit land and shifted the burden against them to prove that they acquired the title in a regular manner, when in fact the 1<sup>st</sup> respondent had not in his pleadings made an issue of it.
23. Reliance has been placed on Section 26 of the *Land Registration Act* by the appellants. The *Land Registration Act* [LRA] came into effect in 2012, repealing among others the *Registered Land Act* Cap 300 Laws of Kenya under which the appellants’ title had been issued. Section 26 provides:
  - “Certificate of title to be held as conclusive evidence of proprietorship.
    1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
      - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
      - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
    2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original. “
24. This Section is categorical that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land but the same can be challenged where the Certificate of title has been acquired fraudulently, unprocedurally or through corrupt practice. See *Elijah Makeri Nyangwu vs Stephen Mungai Njuguna & Another* [2013] eKLR, and *Chemei Investments Limited -vs- The Attorney General & Others* Nairobi Petition No. 94 of 2005. Having not pleaded any challenge to the appellants’ title to the suit land, the ELC ought to have disregarded the 1<sup>st</sup> respondent’s oral evidence challenging the title, and should have treated the title as prima facie evidence that the appellants were the proprietors of the suit land, as provided under Section 26 of the LRA. This position was affirmed by this Court in the case of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 others* [2015] eKLR.
25. Furthermore, the burden of proof of any fact lies with the person who alleges, and Section 107 (1) of the *Evidence Act* is clear on this. On the other hand the learned trial Judge shifted the burden of proof against the appellants, finding in his judgment that they had the duty to prove how they obtained the title of the suit land yet it was within a Settlement Scheme. The appellants had produced documents proving that they purchased the suit land from previous owners. In addition, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the Director of Land Adjudication and Settlement and the County and Land Registrar



Kilifi respectively, pleaded that the title held by the appellants was valid. They also pleaded that the Government declared the Mtondia area where the suit land was situated as a Settlement Scheme despite existence of few titles it had issued, including that held by the appellants. These were government officers concerned with the settlement in the area in question, they were also the custodians of the land documents of that area. Having acknowledged the genuineness of the appellants' title to the suit land, in line with Section 26 of the [Land Registration Act](#), the appellants' title could not be impeached.

26. As to whether the 1<sup>st</sup> respondent demonstrated that the lease issued to Cornel Paul Okech in 1974 was fraudulent; It is the appellants' case that the 1<sup>st</sup> respondent did not support his claim that the lease of 1974 issued to Cornel Paul Okech was obsolete and a nullity as he did not state in his pleading any particulars that rendered the title a nullity or obsolete. The 1<sup>st</sup> respondent on the other hand argued that since the appellants knew that the suit land was within Mtondia Settlement Scheme, this being a property under a Settlement Scheme, it could not have been available for purchase by foreigners as of 30<sup>th</sup> January 1981.
27. We do not think that the 1<sup>st</sup> respondent's argument stands in the face of the law and established legal principles. Section 26 provides the basis upon which a title to land can be challenged or impeached, and stresses that such challenge should be both pleaded and particulars stated in the pleadings and proved. This was reiterated by this Court in [Vijay Morjaria vs. Nansingh Madhusingh Darbar & another](#) [2000] eKLR thus:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [See also Embakasi Properties Limited & Anther v Commissioner of Lands & Anor [2019] eKLR.]
28. It is clear to us that in order to rely on fraud, illegality or that title was acquired unprocedural, it must not only be pleaded but such party must clearly particularize the acts which constitute the ill claimed. This is also the requirement under the [Civil Procedure Rules](#), Order 2 Rule 10 thereof that fraud must be pleaded and the particulars stated. We have considered the 1<sup>st</sup> respondent's plaint before the ELC. The very first instance that the 1<sup>st</sup> respondent makes reference to the title of Cornel Paul Okech was in the section of “prayers sought”. The prayer sought as Order a) “A declaration as obsolete and a nullity a lease dated 22nd July 1974 to CORNEL PAUL OKECH entered in the encumbrances section of the Green Card to Land Parcel No. 182 Mtondia.” No particulars of fraud or nullity were pleaded or the specific acts constituting fraud particularized anywhere in his plaint. In the 1<sup>st</sup> respondents written statement, he sets out in passing that the title of Cornel Paul Okech was a forgery, without giving any specifics. He then states that the transfer of title to the appellants was a nullity, again without giving any details of the alleged nullity.
29. We have also considered the judgment of the learned ELC Judge. The Judge did not address his mind to the issue of the case against Cornel Paul Okech, or to the deficiency of the 1<sup>st</sup> respondent's pleadings and evidence in that regard. After making the observations he did in regard to the appellants title, how they failed to adduce evidence to show that they paid any consideration for the suit land and the requirement that they prove their title was legally or regularly acquired, the court shifted its attention to the 1<sup>st</sup> appellant's evidence supported by the Letter of offer. The 1<sup>st</sup> respondent's pleading were wanting for purposes of impeaching the title of Cornel Paul Okech for failure to meet the statutory requirements and parameters set under section 26 of the LRA.



30. Regarding whether challenging the title of a third party who is not a party to the suit is fatal to the case. It is worth mentioning here that the title decreed by the 1<sup>st</sup> respondent, and against which an order of nullification was sought was not the one held by the appellants, but rather the one issued to Cornel Paul Okech, a person not enjoined in the suit, whether as a defendant or third party.
31. As the trial court, once it noted that a necessary party had been left out of the proceedings and yet adverse orders were sought against them, the ELC should have sought to have such a party enjoined in the suit. Cornel Paul Okech is the person who knew the circumstances under which he acquired the original title, and he was therefore the best placed to explain the circumstances under which he acquired it. It is against natural justice to condemn a person unheard. This was the position taken in *Republic vs. the Honourable the Chief Justice of Kenya & Others Ex Parte Justice Moiyo Mataiya Ole Keiwua* Nairobi HCMCA No. 1298 of 2004 in which the Court held that:
- “The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.”[See Rep vs Non-Governmental Organization Coordination Board Ex-Parte Evans Kidero Foundation [2017] eKLR].
31. The answer then to this issue is that the ELC was in error in entertaining the case against a party that was named in the pleadings, and against whom adverse orders were sought, and in proceeding to nullify his title without giving him an opportunity to be heard.
32. As to whether the doctrine of legitimate expectation applied. It was the submissions of Mr. Litoro for the appellants that the learned trial Judge misapplied the doctrine of legitimate expectation on the basis that before the Letter of Offer issued to the 1<sup>st</sup> respondent was recalled, he had not complied with the requirements set out in the said offer. Secondly, a letter of offer was subject to revocation by the offeror. Mr. Obaga for the 1<sup>st</sup> respondent submitted that the 1<sup>st</sup> respondent had complied with the requirements on the basis that he was the one on the ground when the adjudication officers visited the area and confirmed that he had made developments thereon.
33. In his judgment the learned ELC found that the 1<sup>st</sup> respondent applied for and was allocated the suit land by the Government, through a Letter of Offer dated 25<sup>th</sup> August 2014; but that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent declined to receive payments of the deposit for the land and instead demanded the Letter of offer back. The learned Judge then referred to several documents that were filed by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents but not produced as exhibits, and on their basis found that the appellants should have used those documents. Secondly, he found that the documents contradicted the appellants’ evidence in court that they resided on the land, when in fact the documents showed otherwise. The ELC then found that the issuance of the letter of offer to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> respondent, gave rise to a legitimate expectation by the 1<sup>st</sup> respondent that he was entitled to be issued with title documents upon compliance with the conditions of offer. The letter of offer is dated 25<sup>th</sup> August 2014, and is at page 21 of the record of appeal. The conditions given include the payment of outright purchase of



Kshs. 32, 801/= within 90 days of that letter or 10% deposit for the plot. There was a default clause that failure to pay the said amount would lead to cancellation of the offer without further notice. The 1<sup>st</sup> respondent's case was that his attempts to pay for the plot one month later was declined by the 2<sup>nd</sup> respondent.

34. The Supreme Court case of *Communication Commission of Kenya & 5 Others V. Royal Media Services and 5 Others* (above) relied upon by the 1<sup>st</sup> respondent also cited by the learned ELC judge does not aid the respondent's case. The Supreme Court was clear in that case that legitimate expectation cannot override the law. The suit land was registered in the appellants' names, and a certificate of lease issued to them, which certificate was not an issue before the ELC. An offer Letter by a government official cannot be used to cancel, through the back door a certificate of title. It is clear under Section 26 of LRA, that such title cannot be challenged on the basis of a letter of offer, but in the basis of fraud, illegality, or if it is shown that the title holder obtained it unprocedurally. We find that the learned ELC judge misdirected himself as to the law and arrived at a wrong conclusion of the case.
35. In conclusion, we are alive to the fact that this Court should only interfere with the findings of the trial court where the decision is based on no evidence or on a misapprehension of the evidence or where the trial court is demonstrably shown to have acted on wrong principles in reaching its findings. Having considered this appeal we find that the learned trial Judge impeached the appellants' title yet the same was not an issue before the court as it was not pleaded; that the court made findings of fact that the title of a party not invited to the suit was a nullity without any basis, as the same was not supported by the pleadings or evidence. Finally, the Court misapplied the doctrine of legitimate expectation elevating it above the law and overlooking the sanctity of a certificate of lease as provided under Section 36 of the LRA.
35. Bearing this in mind, and based on our findings as above, we find that the appellants' appeal against the judgment of the ELC has merit, and that there is reason to interfere with it. Accordingly, we order as follows:
1. The appellants appeal is allowed, and the judgment of the ELC Civil Case No. 25 of 2014 dated 6<sup>th</sup> May, 2020 is set aside along with all the consequential orders.
  2. The appellants will have the costs of this appeal and of the ELC suit.

Those are our orders.

**DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2022**

**S. GATEMBU KAIRU (FCI Arb)**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

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



Signed

**DEPUTY REGISTRAR**

